Supreme Court, U.S.
F D

No. 991042 DEC 14 1999

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In the
SUPREME COURT of the UNITED STATES

Robin and Karen Zahran

Petitioners,

v.

GERALD G. SHCMIDT, JR. individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PEITITION FOR A WRIT OF CERTIORARI

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156 pp

QUESTIONS PRESENTED FOR REVIEW

1.. Whether Zahrans' Constitutional right to a jury trial pursuant to the 7th Amendment were discarded by the courts below through striking of Zahrans' jury demand.

2. Whether the courts below defected from this basic Court's rulings and guidelines on expert's

3. Whether the lower courts defected from their constitutional authority in overruling the State of Wisconsin Statutes and Wisconsin Supreme Court rulings referencing Wisconsin Insurance Statutes

4. Whether the courts below defected from the basic and normal course of judicial proceedings resulting in the confiscation of petitioners' constitutional rights of equal protection pursuant to the 14th Amendment and violation of their rights to due process pursuant to the 5th and 14th Amendment of the constitution

5. Defendant, Attorney Kmiec's alleged amended contract

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STATEMENT OF FACTS
HISTORY AND BACKGROUND

Robin and Karen Zahran are owners of a dairy farm which was insured by Frankenmuth Insurance Company of Michigan. On May 24, 1989, a tornado struck the farm causing severe property damage. Frankenmuth adjusters inspected and evaluated the damage. On July 25, a payment of $25,000 was made, and on August 7, 1989 additional various payments for different covered items in the amount of $136,687.78 were paid to Zahrans and the mortgagees as final payment of the assessed damages, absence reliance on proofs of loss submitted by Zahrans.

Frankenmuth rejected Zahran's proofs of loss as unverified and made further inspections resulting in further payments in October and November. (Appended p.30-36) Frankenmuth refused Zahrans request to repair the buildings (Appended p.37 and 38-41)

In January, 1990 and following Frankenmuth's delays, Zahrans retained Attorney Fitzsimmons to commence litigation in the U.S. District Court for the Northern District of Illinois for breach of contract, bad faith, and violation of Illinois statutes. Frankenmuth filed an answer, affirmative defenses and a counterclaim claiming all losses were paid in full and that Frankenmuth relied upon misrepresentations by Zahrans in making their payments and that Zahrans committed fraud with intent to deceive. The complaint was transferred to the Eastern District of Wisconsin under case number 90 C 337. On March 10, 1990, Frankenmuth's agents and attorney visited the farm for further assessment. They visited one of Zahrans' previous disgruntled employees who resided at one of the dwellings. Eight days later, that house went up in flames. Frankenmuth immediately inferred arson by Robin Zahran and later at the trial throughout the tornado litigation.

After the trial and eviction, the ex-employee (occupant of that house) admitted that the fire was accidentally caused by him.

On July 8, 1990, another fire occurred at the farm damaging some of the farm buildings previously damaged by the tornado and already claimed by Zahrans. Zahrans retained Attorney Schmidt of Milwaukee for representation, pursuant to a specific written agreement upon the complaint transfer to Milwaukee from Chicago.

Schmidt was retained to pursue Zahrans' claims caused by the fires and the tornado. He submitted a proof of loss on Aug. 28, 1990, pursuant to the fire by using estimates dated Sept. 20, 1989 made pursuant to the tornado assessments a year earlier without Zahrans knowledge. He pursued no discovery despite pending discovery deadlines to be completed by December 15, 1990, nor did he amend the pleadings of which some contained erroneous allegations, nor did he respond to Frankenmuth's allegations of misrepresentations.

Attorney Burrell substituted for Schmidt pursuant to a written contract. He was to pursue and investigate the relationships between Frankenmuth agents and the fires among other duties. Burrell discovered early on through his contacts with Wis. Dept. of Criminal investigations of a conspiracy by Frankenmuth and its adjusters against Zahrans to deprive Zahrans of their insurance claims proceeds through allegations of arson by Robin Zahran.

Burrell never pursued, through discovery, the issues of misrepresentation alleged by Frankenmuth, and failed to pursue Frankenmuth's concealment of documents in discovery, nor honored his contract and commitments to investigate all evidence that may have lead to who ever was responsible for the fires, and their relationships to Frankenmuth's allegations of fraud.

Burrell adopted the unwritten and undeclared position that Frankenmuth payments, after the denial of Zahrans' proofs of loss, estopped Frankenmuth from its ability to cancel coverage or void the policy even if their allegations were true, and that Zahrans should be able to use that legal defense at trial; reasoning that Frankenmuth's payments estopped them from a later declaration that the claim was invalid or that the policy

was void and that the term "an insured," refers to the individual insured under Wisconsin Law vs. "any insured", which would apply to all insureds and that Zahrans were separate insureds pursuant to the specific provisions of the policy. His reasoning was that Frankenmuth did not allege or indicate at any time that Zahrans were engaged in misrepresentations or fraud before Zahrans' filed their lawsuit.

Burrell did not object to Frankenmuth amending their affirmative defenses and counterclaim by incorporating the proof of loss dated Aug. 28, 1990, filed by attorney Schmidt, which the court allowed absent showing of any objection by Burrell.

Attorney Kmiec substituted for Burrell as an expert on insurance bad faith matters. He wasn't aware that a third proof of loss was filed by Schmidt in the fire claim. He never asked any of Frankenmuth's witnesses nor solicited any evidence relating to Frankenmuth allegations of misrepresentations or fraud committed by Zahrans and never preserved the issue of estoppel, reliance or Zahran's policy defenses on record because he never thought they were related to the issues of the disputes.

In the original trial, Kmiec attempted to submit new jury instructions and verdict form after the jury were deliberating, of which Judge Curran denied as too late and were waived. Nor was Judge Curran able to understand how Kmiec could present arguments to the jury, carry on a trail knowing that the issue of reliance was not in the jury instructions or the special verdict form and not object to it prior to the jury deliberations. Judge Curran commented that he can agree that there wasn't any evidence as to the misrepresentation or fraud allegations but that he was not going to recall the jury and give new instructions or a new verdict. ('wishing that the jury will correct their mistakes')

Kmiec did not file an amended reply to Frankenmuth's counterclaim and failed to request the court to instruct the jury that Frankenmuth had the obligation to prove reliance on Zahrans' misrepresentations with intent to deceive to find fraud,

or misrepresentation to defeat Zahrans' claims as was plead by Frankenmuth in its counterclaim and affirmative defenses. Nor did Kmiec advise Zahrans that they should hire a separate lawyer for representation, nor did he submit jury instructions on the innocent insured rule. He knew that the expert he retained to assess the damage submitted erroneous report at trial without either of Zahrans' knowledge or inspection.

Throughout the litigation, Kmiec did not seek court permission to amend pleadings, nor attempted to prove Zahrans' affirmative defenses plead by Burrell with the facts available, and never considered reliance, estoppel or innocent insured arguments and defenses as part of the issues or defenses, nor did Kmiec object to the interjecting of the fire losses by Frankenmuth in the tornado trial through opening and closing arguments and other inferences. Appended, p.26-29

Zahran directed his attorney to inform Frankenmuth, through his statement under oath and deposition, that he did not want nor expected to be paid twice for the same losses caused by the fire and tornado. The attorneys failed to act or plead Zahrans' contentions. Appended p.19-25

Frankenmuth made a payment of $99,995 as their assessment of the fire loss and rejected the proof of loss submitted by Attorney Schmidt and immediately moved the court to amend their pleadings, in the tornado litigation by alleging the additional misrepresentation and fraud by Zahrans through the additional filing of a proof of loss in the fire claim.

Attorney Burrell was under the impression that he settled the contract dispute claims with Frankenmuth, leaving the bad faith claim for Kmiec, as the expert to prosecute. .Appended p.111-113

In the original trial and in its opening statement to the attention of the jury, Frankenmuth claimed Robin Zahran misrepresented and committed fraud by claiming damage twice, once as a result of the tornado, and once as a result of the fire, for the same loss. Appended p.26-29.

At trial, Kmiec made no motion in limini referencing the fires nor objections, nor any motion for mistrial was ever

made. No defense to Frankenmuth's allegations were uttered, nor was any attempt to elicit testimony on the alleged misrepresentations made, nor did he attempt to defend against such allegations, nor was there one single question as to what specifically either of Zahrans misrepresented as to what fraud was committed by them. There was only Frankenmuth's attorney's opening and closing arguments without objections by Kmiec or testimony to contradict.

None of Zahrans' attorneys, (all of whom displayed themselves as experts on insurance matters) forwarded any pleadings or defenses based on the clear policy language of reliance as a necessary element to void the policy coverage, nor was Wisconsin statue or court case citations cited pursuant to Wisc. law as a defense, nor did Zahrans' attorneys attempt to dispute or rebut or defend against Frankenmuth's contentions pursuant to Wis. Law. Nor was there any pleadings pursuant Wisconsin Statute 631.11 (1)(b) Appended p. 17-18

No pleadings of either judicial or promissory estoppel pursuant to the record was made. No discovery on the issues of misrepresentation allegations, nor correcting of pleadings, nor proper cross examination of witnesses on false statements and testimonies given earlier in depositions which conflicted with Frankenmuth's witnesses trial testimony was brought up.

The jury, in lieu of all the above, returned a verdict that Zahrans violated the policy provision relating to misrepresentation. No one knows or will ever know what specific misrepresentations, concealment or fraud were made by either of Zahrans or what did the jury determine in that reference or how were these representations related to Zahrans' claims or the policy provisions or to the allegations of misrepresentations alleged by Frankenmuth.

Attorney Kmiec moved, after the trial, to set aside the verdict, pleading what he should have plead throughout the litigation referencing the issues of reliance, estoppel, policy languages, and Wisc. statue defenses. Kmiec blamed the judge's clerk for not taking his objections to the judge of which none appear on record. Judge Curran denied the motion and

dismissed Zahrans' complaint against Frankenmuth and dismissed the counterclaim based on Frankenmuth's failure to submit jury instructions on their claims and Frankenmuth's failure to prove reliance on Zahrans' alleged misrepresentations which was an element of their claims of misrepresentations plead in their affirmative defenses and counterclaim.

Zahrans' appealed and the appeal court affirmed the district court's dismissal of Zahrans' claims and remanded the case to the district court for the entry of judgement against Zahrans on Frankenmuth's counterclaim. The appeal court stated that Zahrans waived at trial their objections and defenses of estoppel, reliance, innocent insured, and introduction of prejudicial evidence because they were not raised at trial among other waived defenses. Appended p. 1-13

Following the appeal court decision, Zahrans filed their action for malpractice against their attorneys for breach of contract, negligence, and fraud.

The Expert's Testimony

At the trial in the malpractice case, Thomas Gooch, (Zahrans' expert) testified he is a member of both the 7th Circuit and the U.S. District Court Bar since 1979 and that most of his work is in the area of legal malpractice and he is qualified to render an expert opinion based on his knowledge of the facts and the issues and that he met Zahrans, read the jury instructions, depositions, trial transcripts, and researched the applicable laws, and Frankenmuth policy provisions before he rendered his opinion.

Gooch concluded that Schmidt violated his duty of care and was negligent for failure to amend the pleadings, and for the filing of an erroneous proof of loss, and that Schmidt's failure to withdraw from representing both of Zahrans upon realizing that Frankenmuth was directing its accusations of concealment and fraud at Robin Zahran not at Karen Zahran, especially were the policy language and contract considered Robin Zahran and Karen Zahran as separate, individual and distinguished insureds, and that representing both was a conflict of interest which

commanded malpractice, negligence and a breach of duty of care in lieu of Frankenmuth's allegations.

Gooch's testimony was that Schmidt was negligent in that he failed to deal and invoke the policy language clear defenses that no misrepresentation or breach of affirmative warranties effects Frankenmuth's obligation under the policy until they (1) Frankenmuth relies on it **and** it is either material or is made with intent to deceive or (2) the act misrepresented or falsely warranted contributes to the loss and that Schmidt should have plead that Frankenmuth made payments prior to the submittals of any proofs of loss and that Schmidt should have stressed, plead, and pursued the innocent insured rule pursuant to Wisc. Law and that the policy cannot be voided as to an insured for a wrong or misdeed of the other insureds.

Gooch's opinion was that Burrell failed to recognize that he should not have represented both Robin and Karen Zahran because of the innocent insured rule and conflict of interest, especially where he communicated the fact referencing Karen Zahran and Wis. Law to Frankenmuth when it plead that Robin Zahran may have been involved in misrepresentation and that Burrell could have only represented one of them zealously. Therefore, he violated his duty of care and was negligent and guilty of malpractice.

Gooch's testimony was that Burrell filed no pleadings referencing the innocence of Karen Zahran, nor carried out any discovery on the issue of reliance on Zahrans' misrepresentations as alleged by Frankenmuth, nor did Burrell address the issue if Frankenmuth should have been estopped from pursuing their claims plead in their affirmative defenses and counterclaim, and that the lack of discovery by Burrell on these issues was a breach of the standard of care and an act of negligence, malpractice and a breach of contract.

Gooch concluded that the failure by all the attorneys to carry discovery on Frankenmuth's allegations or to plead the issues of reliance and estoppel as affirmative defenses to Frankenmuth's counterclaim and their failure to bring these issues to the attention of the court at an earlier stage, in lieu of

Frankenmuth's creation of smoke-screens and inferences of fire occurrences by Robin Zahran as a bargaining tool as they relate to the insurance policy provisions, were so basic and fundamental that it commanded findings of breach of the standard of care, negligence and malpractice.

Gooch's opinion was that Kmiec had a conflict of interest in representing both Robin and Karen Zahran preventing him from using the innocent insured argument at trial, and that Kmiec did not attempt to correct Schmidt's erroneous proof of loss, nor did he file motions in limini referencing the fire issues to be barred from being introduced at trial, and that Kmiec objected to consolidation of both cases which resulted in prejudice, confusion, surprise, suspicion and multiple litigation and appeals over the years.

Gooch's opinion was that Kmiec failed to raise or preserve the innocent insured rule, estoppel, reliance, prejudicial evidence introduced at trial arguments, for review on appeal by failing to raise them during trial, or in post-trial motions, or at the jury instruction conference, nor did Kmiec offer jury instructions on the subject of reliance, estoppel, innocent insured, policy language provisions. Nor did Kmiec move to dismiss Frankenmuth's counterclaim prior to the case going to the jury due to Frankenmuth's lack of proof on their allegations of reliance on any of Zahrans' alleged misrepresentations plead in its affirmative defense and counterclaim and for Frankenmuth's failure to provide jury instructions on its counterclaim even after so ordered by the court, nor did Kmiec object to the jury verdict first question because he never read it, nor knew its contests until after the jury started their deliberations.

PROCEDURAL HISTROY IN THE COURTS BELOW

Zahrans filed their action for breach of contract, malpractice, negligence and fraud in the US District Court for the Eastern District of Wisconsin after the Appeal Court issued its order on March 28, 1994 ruling for Frankenmuth and

directing the district court to enter judgement on Frankenmuth's counterclaim. The Appeal Court rejected Zahrans arguments on appeal referencing estoppel, reliance, prejudicial evidence introduction at trial, opening and closing argument infractions, innocent insured arguments as have been waived, since they were not raised at trial. Appended p. 1-13.

Zahrans' appeal was preceded by the District Court order denying Zahrans motion after verdict for a new trial brought by attorney Kmiec, and Frankenmuth's motion for judgement on its counterclaim. Appended here p. 14-16

The District Court based its decision on Wis. statute 631.11 (1)(b) referencing misrepresentation and breach of affirmative warranties, and on Frankenmuth refusal to submit jury instructions on its counterclaim and its failure to prove that it relied on Zahrans' representations to its determent.

Appended p. 17-18.

The malpractice case was originally assigned through random to Judge Gordon. On or about May 1997, Judge Gordon reassigned the case without random to Judge Clevert who was familiar with certain witnesses, testimonies and who failed to disqualify or recuse himself based on 28 USC 455. Due to his familiarity with the witnesses and the record of the case, Judge Clevert, upon assignment struck Zahrans jury demand over Zahrans' objections in his order dated May 29, 1997, and disallowed Zahran from taking Kmiec's deposition testimony.

At the trial, Judge Clevert disallowed Zahrans from eliciting testimony from Frankenmuth's original witnesses in the underlying case which would have shown contradictory statements that were available for Kmiec but failed to use, (Appended p. 26-29 and p. 30-36) and disallowed Zahrans from introducing evidence to prove the attorneys negligence through their handling of the fire adjustment and complaint. He stated that he will allow evidence only to the allegations of the tornado malpractice case. Finally, Judge Clevert made his rulings without final arguments stating he knows the issues and was in no need of argument presentations.

After Judge Clevert's rulings, Zahrans filed their detailed and specific Rule 59 motion addressing Judge Clevert's erroneous and prejudicial rulings of which he denied. Zahrans appealed and retained Attorney Andy Cohen, who is a named attorney on the honor roll of the 7th Circuit, and both agreed as a condition of his representation, that Cohen will review with Zahrans the appeal briefs before he files them.

On Sept. 18, 1998 as a result of one of the appeal briefs filed by Cohen without Zahrans' knowledge, the appeal court issued an order sanctioning Zahrans for filing suit against Frankenmuth and Manitowoc County Sheriff Department for the take over of Zahrans' farm property and animals to aid Frankenmuth in executing its collection of its judgement obtained against Zahrans pursuant to the appeal court order in Case No. 90-C-337. That take over occurred on April 25, 1996 and is related to the writ of certiorari petition No. 99-518.

Cohen and Zahrans, upon reading the appeal court panel decision and sanctions dated 9/18/98, believed that Zahrans will not have a fair hearing before the appeal court panel because of their prejudicial determinations against Zahrans as appears in their tone and order of Sept. 18th combined with Attorney Cohen's statement to Zahrans that certain of the panels law clerks informed him that the judges directed them to discard and draft rulings against Zahrans' appeals and motions without wasting time and agreed to move the panel for disqualification and for reassignment pursuant to circuit court rules on assignment and disclosure of panel judges.

Cohen failed to act, replying to Zahrans he wasn't going to take a chance in lieu of his relationships with the court, suggesting to petition the Supreme Court requesting from the Honorable Justice Stevens to stay all pending matters before the 7 th Circuit referencing Zahrans until he files a petition for disqualification of the panel members. Accordingly, Zahrans agreed. Cohen informed Zahrans on 11/03/98 that he petitioned the Supreme Court to stay all pending matters and orders of the appeal court until a ruling by the Supreme Court on Zahrans'

petition referencing the assignment and the constitution of the panel is issued. Appended p. 116-118

Zahrans discovered that Cohen, in fact failed to properly file the petitions with the Supreme Ct., nor did he notify the 7th Circuit of his petition, and filed the two additional briefs, one of which is the subject of this instant petition and another petition without Zahrans knowledge or approval of which he inadequately briefed the issues. Zahrans further discovered additional fraudulent conduct by Cohen referencing the payment of fees, accordingly, Zahrans moved the appeal court on 12/18/98 to allow them the opportunity to file appeal briefs on their own behalf due to fraud of Cohen. Appended p. 51-52 The court granted and entered a scheduling order, dated 12/22/98, received on 12/28/98, allowing the filing of limited supplemental briefs by Zahrans within extremely limited time period. The appeal court further denied Zahrans' motions to compel Cohen to turn over their files so they could prepare their supplemental briefs and denied Zahrans' motion for extension of time by eleven days to file their brief. Appended p. 53-54

The appeal court further denied Zahrans' motion for extension of time by 11 days to file their supplemental brief and denied their motion to file their brief to contain 12,000 words instead of 7,000 words and denied Zahrans' motion to file their brief for being late five (5) minutes instanter. Appended p. 55-57 The court further denied Zahrans' motion to reconsider the denial of filing their appeal brief, Appended p. 58 but allowed appellees to file their briefs instanter on 2/24/99, Appended p. 59, and denied Zahrans' two motions for disqualification or reassignment. Appended p.60-61

On Feb. 22, 1999, Judge Clevert granted all the defendants bill of costs. Zahrans appealed. Appeal #99-1780. The appeal court, without briefing or allowing Zahrans to brief their appeal, summarily affirmed the district court granting of costs to Defendants against Zahrans in its unpublished order dated April 14, 1999. Appended p. 63 - 71.

The appeal court stated in their order that they issued their order and judgement after they inspected the file, and the

record submitted to them on March 10, 1999 consisting of 6 volumes of pleadings, 16 loose pleadings, 20 volumes of transcripts, and 3 exhibit boxes without oral argument. These statements seem to contradict the record of the transmittal letter dated March 30, 1999. Appended p. 107-108.

The submittal letter of the district court shows the file was sent to the appeal court from Milwaukee, Wisconsin on March 30, 1999, which contradicts the appeal court letter dated May 6, 1999 informing the clerk of the district court for the Eastern District of Wisconsin that there was no record filed in appeal no. 99-1780, Appended p. 109-110 referencing the bill of costs appeal, further showing that the appeal panel made their decisions, written their order with all its citations, and inspected the huge record of the main two appeals and briefs in less than 14 days. This fact gave much credibility to Attorney Cohen's statement referencing the panel's predetermined thoughts and decisions on Zahrans' appeals.

ARGUMENT

1.

ZAHRANS CONSTITUTIONAL RIGHTS TO A JURY TRIAL PURSUANT TO THE 7TH AMENDMENT WERE DISCARDED AND VIOLATED BY THE LOWER COURTS THROUGH STRIKING ZAHRANS' JURY DEMAND

The subject complaint was originally assigned to Judge Gordon who granted Zahrans' motion to file their amended complaints in February, 1997. Karen Zahran filed her amended complaint and demanded a jury trial per Rule 38(b). Judge Clevert was substituted for Judge Gordon. He immediately struck the jury demand the first time he held a hearing to familiarise himself with up to date history of the case. Zahrans objected to his striking the jury demand and the court denied their objections.

It is well established and rooted in our laws and Constitution that a court's denial of a jury trial upon demand is

reviewed with the most exacting scrutiny U.S.C.A. Seventh Amendment, and unless the denial is harmless, appeal courts must reverse order upon the unconstitutional denial of rights to a jury trail. The lower courts violated Zahrans' basic constitutional rights to a jury trial by striking Zahrans' jury demand. *A.C. Miller Federal Practice and Procedures*, 2234 at 115-116, (1971) *Herschinger v. All State Co.*, 884 F Supp. 317, *and Whirlpool Financial Corp. v. Delaware Corp.*, 866 F. Supp. 1102 (N.D. IL 1994) *Partee v. Buch*, 28 F.3d 835 (C.A. 7 1994) and *McCarthy v. Bronson*, 906 F.2d 835 (C.A. 7, 1990). It is an error to strike a jury demand unless the defendant was entitled to a directed verdict. *Partee v. Buch*, 28 F.3d 835 (C.A.7 1994) *McCarthy v. Bronson*, 906 F.2d 835 (C.A. 7 1990) *William Dasho v. Susanehannh*, 461 F2d 11 (C.A.7) *F.U.I.C. v. Myron Palermo*, 815 F2d 1329 (C.A.10) and *Daniel InterNatl v. Moore*, 916 F2d 1061.

The striking of the demand and its affirmation on appeal which the panel ignored to address is in conflict with other U.S. Court of Appeals decisions and with this Court rulings and opinions. It is well established in the American system of justice that a trial by jury, impartially selected, is a right that should not be compromised as there is nothing of greater excellency than a trial by juries which represents the courthouse democracy. None could have put it clearer than one of this court's own members, Chief Justice William H. Rehnquist *in* declaring,

"The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence."

"A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded..."1

"[T]hose who oppose the use of juries in civil trial seem to ignore [that] [t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."

"The guarantees of the Seventh Amendment will prove burdensome in some instances....But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the Amendment."

This opinion is exactly on point as it relates to this case and issue of courtroom democracy and protection against tyranny and corruption in the administration of courtroom justice through rights of citizens for a jury trial and guards against such possible tyranny. Accordingly, these petitioners pray this Honorable Court to remand the complaint for a trial by jury

There was no constitutional challenge to Wis. Statute 631.11 (b) referencing the policy provisions on reliance. Its enforcement is conclusive upon the courts and the parties, *Old Dearborn Distributing Co. v. Seagrams Distillers Corp.* 299 U.S. 183 81 L Ed 109 57 S.C.T. 139 7, and is not subject to other interpretations by the federal courts as they must apply it as written by the state legislature, nor could they substitute their social and economic beliefs for the judgement of legislative bodies, who are elected to pass laws. *North Dakota State Board of Pharmacy v. Snyder Drug Stores Inc.* 414 U.S. 156 38 L Ed 2d 379 94 S.C.T. 407.

2.
THE LOWER COURT DEFECTED FROM THIS COURT'S RULINGS AND GUIDELINES ON EXPERT'S MALPRACTICE

A. Wisconsin Standard Rule on Malpractice

The standing rule in legal malpractice pursuant to Wis. Law is that the best evidence in a case is the record of what happened in the original case. Zahrans' malpractice expert testimony was almost a verbatim recitations of what actually happened in the original case. Had the record of the underlining case been considered by the lower courts and by the appeal court based on Wis. statute without prejudice and prejudicial determinations, there would have been only one conclusion, and that Zahrans must prevail as a matter of law pursuant to Wis.

Statute (893.53) governing malpractice, because the fact issues are decided by the jury and the law issues are decided by the court. *Helmbrecht v. St. Paul Co. 122 Wis. 2d 94 362 NS. 2d 118.*

The lower courts did not want nor consider the record of what happened in the original case, evidenced by the courts attempts to justify their reasoning for their rulings in attacking Zahrans for their persistence in seeking the truth pursuant to the Code of Civil Rules of Civil Procedures.

The Wisconsin Supreme Court in *Dethorne v. Bakken*, 535 N.W. 2d 91, declared that there is areas of malpractice where the issues, facts, and the law are clear to the point where an expert's testimony is of no need to help the trier of fact. In this case, the trier of fact is a federal judge. He was of no need to have an expert explain to him the previous court's rulings referencing the infractions and negligent acts and waivers of defenses in the original case against Frankenmuth and that the Plaintiffs' attorneys waived and did not pursue their duties as was assigned to them by their clients.

B. Zahrans' Expert Testimony

As pointed out, Zahrans' expert testified specifically to what actually happened in the earlier litigation at all stages supported by the facts and the court rulings throughout. Even the Defendants' experts agreed with Zahrans' expert referencing what happened in the original case regarding the waivers by Zahrans' attorneys of Zahrans defenses including but not limited to: reliance, estoppel, policy provisions referencing misrepresentations, Wis. Law 631.11(b), the Defendants failure to carry discovery on Frankenmuth's allegations and pleadings, and their failure to move to dismiss the allegations due to lack of proof.

Zahrans' expert testimonies at trial was totally supported by the law of the case that had been already established through the scrutiny of the original appeal court member findings and the findings of the district court in the original case, dated 3/28/94. Appended p. 1-13, 14-16. Dated

2/28/92 The original panel and the district court found that the Defendants failed to raise in the underlining proceedings and waived the issues of reliance, innocent insured, estoppel, waiver, motion to dismiss Frankenmuth pleadings as a matter of law, amending of pleadings, discovery and other matters; all of which are elements of malpractice.

C. The Original Court Findings Support Zahrans' Legal Malpractice Claims

The lower court's findings were that Zahrans' expert was not credible and not to be believed in lieu of the record and the law of the case contrary to what was found by the original two courts who rendered an opinion of the file. It is unfounded and an abuse of the judicial powers of the court through the demonstrating of bias and prejudice, especially where the new judge couldn't change the older findings on res dujicata grounds but ignored it anyway.

Judge Curran, who tried the original case, and the appeal Judges Coffey, Cummings, and Zagel found that Frankenmuth did not rely on Zahrans' alleged misrepresentations as plead in their affirmative defenses and counterclaim and as expert Gooch testified that all the issues that were raised in the malpractice as infractions by the attorneys have been waived including objections to Wis. Statute 631.11(1)(b) referencing misrepresentations, reliance, estoppel, and policy provisions.

It is clear that Judge Clevert and the panel in affirming his order and judgement were clearly bias as was demonstrated by their rulings and as evidenced by their prejudicial determinations and their failure to follow the rules established by this court referencing expert testimony in *Daubert v. Bakken*, 125 LEd 2d 469.

D. Defendants Experts Agree With Zahrans' Expert

Kmiec's own expert admitted to the infractions that Kmiec committed and failed to do, including the failure to raise the issues of reliance and estoppel at trial or requesting jury

instructions. These various waivers of defenses is malpractice. *Cook v. Continental Casualty,* 180 Wis. 2d 237 509 N.W. 2d 100.

Kmiec's expert admitted at trial that he missed an opportunity and committed a negligent act for failure to move to dismiss Frankenmuth's counterclaim at the time Frankenmuth refused to submit jury instructions on its counterclaim. *Celotex Corp. Inc. (i.d.)* That waiver was a negligent act, breach of contract and the duty of care upon applying Wis. Law, other jurisdictions, and this Court as precedents. *McNight v. Gingras,*966, Fed. Supp 801 E.D.W. (1997), *Eagle Foundation v. Dole Global Mututal of N.Y. v. Wulff,* U.S. 326 24 L.Ed 387, *Overstreet v. Kentucky Central Life*, 960 F2d 1020, Judge Clevert totally ignored these waivers.

Kmiec waived the argument of the policy provisions that Zahrans claims cannot be defeated absence reliance on these claims by Frankenmuth. Such waiver was malpractice pursuant to Wis. Law and the law in the 7th Circuit jurisdictions. *Transport Inc. v. Galvin,* 39 F3d 812 (C.A. 7)

Zahrans' defenses were clear and simple. All Kmiec had to do was to plead the non-reliance, as admitted by his own expert and elicit the testimony at trial from Frankenmuth's' witnesses to prove that reliance was a condition that Frankenmuth had to prove before they could prevail on their pleadings. Kmiec failed and his excuse was that, "We were simply out-gunned." There was no misrepresentation waiver of a defense or a right and failure to carry discovery on the defenses and rights of a client's attorneys negligence and malpractice. *American Adjusters v. Galvin.* (i.d.), *McKnight v. Gingras.*

E. The Lower Court's Prejudice

Judge Clevert and the appeal court panel are blaming Zahrans for multiple litigation referencing the tornado and fire litigation's which all should have been in one case right from the beginning. Had Zahrans' attorneys carried all discovery needed, named all the interested parties, filed all the necessary pleadings,

and behaved as responsible attorneys, they would have saved much resources and expenses of all involved including the courts and especially Zahrans as they have footed the bill throughout the last 10 years, and had Kmiec not objected through the filings of his unlicensed and acting attorney's son's to object to consolidation motions filed by Frankenmuth for fire and tornado cases in court without Zahrans' knowledge or approval the outcome may have been totally different.

F. The Attorneys' Specific Acts

None of the attorneys advocated zealously Zahrans' positions nor did they forward the facts. The obligations and duty of Defendants' legal ethics in the representation of their clients requires zealous advocacy of a client's position. *Dirkington v. Hendricks County Electric Corp.*, 460 N.E. 2d 1006. Zahrans' lawyers should have been more careful than more careless. These acts and circumstances bring an almost identical recent malpractice case determined by the 7th Circuit in which Honorable Judge Posner commented on attorney's negligence. *American International Adj. v. Galvin*, 86 Fed. 3d 1455

In the original case, Frankenmuth had the duty to prove at trial their pleadings on file with the court to prevail. Wis. Law calls for the reversal of the district court decision where the trial court has incorrectly decided a legal issue, *Germanotta v. National Indemnity Corp.*349 N.W. 2d 733, 119 Wis. 2d 293 or if the law have been erroneously applied without deferral to the trial court. *Roe v. Larson*, 287 N.W. 2d 824, 94 Wis. 2d 204. In this case, reversal should have been the judgement by the appeal court pursuant to Wis. Law on malpractice when section 631(11)(b) provisions and the policy provisions are applied.

G. The Attorneys Had Conflict of Interest

An attorney may act as counsel for both parties with the knowledge and consent of both, but when a conflict of interest does arise, it becomes his duty as an attorney to make full

disclosure to both or to terminate the relationship of attorney and client as to both. *State v Rogers*, 226 Wis. 39 275 N.W. 910 and *Kagel v. First Commonwealth Co.*, 534 Fed. 2d 194.

Frankenmuth's pleadings created such conflict. The attorneys did not act on their conflict of representation with Robin and Karen Zahran nor made any pleadings. Kmiec did not raise at trial the innocent insured argument because no one plead it in the first place and that such should have been plead if is to be pursued, according to his expert pursuant to Wis. Law and many other jurisdictions as the right of each insured is separate and if innocent, they can't be forfeited. *All States Ins. v. Janes*, 845 Fed 2d 315 (C.A.11) *Hanes v. Hanover*, 783 Fed2 136. Frankenmuth (the original Defendant) recognized that fact and law.

Karen Zahran's attorneys duties to her were independent of their duties to Robin Zahran. They should have represented her interests without interference of other loyalties or ethical obligations to Robin when the issues arose at the time in that Frankenmuth started their accusations at Robin Zahran. The attorneys should have recognized their duties and withdraw from representation of either of Zahrans in order for her to utilize Wis. Law referencing innocent insureds as declared in *Hedtke v. Sentry Ins.* 109 Wis 2d 4651 326 N.S. 2d 717 (1982).

Attorneys failure to act on the conflict of interest under the circumstances resulted in waivers and forfeitures of Karen Zahran's claims which they failed to advocate independent of Robin Zahran. *Lane V. Richard*, 957 Fed. 2d 363 (C.A. 1992), *Mahoney v. Kesery*, 778Fed. Supp. 1002 E.D. (WI)

3.

THE LOWER COURTS DEFECTED FROM THEIR CONSTITUTIONAL AUTHORITY IN OVERRULING THE STATE OF WISCONSIN STATUTES AND WISCONSIN SUPREME COURT RULINGS REFERENCING WISCONSIN INSURANCE STATUTES

The federal courts must apply state law expressed through its statutes and interpreted by its Supreme Court pursuant to the provisions of the U.S. Constitution declared in the Erie Doctrine.

The Defendants failure to move to dismiss Frankenmuth's affirmative defenses and counterclaim pleadings pursuant to policy language referencing reliance, (Wis. Law (631.11(1)(b)) and the estoppel principles, in effect waived Zahrans' rights through negligence because the law is clear; a party's assertion of fact in their pleadings is a judicial admission by which they are bound by it throughout the proceedings except if waived. *Schoot Motorcycle Supp. v. American Howder Corp.*, 976 F2d 58. *Celotex Corp. v. Catrett*, 477 U.S. 317 322 106 S.Ct 2548 2552 91 L.Ed 265(1986)

Pursuant to Wis. Law, the basis of an insurance company's defense or denial of coverage must be declared within 60 days of the denial. *Estate of Logan by Fink v. Northwestern Natl.*, 416 N.W. 2nd 65 140 Wis 2d 871. Frankenmuth denied Zahrans any more payments on their claim on 11/18/90, for the reasons that they had made all the payments in full upon their own assessment of damage, not as the appeal court erroneously found that Frankenmuth declined payment upon discovery of fraud in the proof of loss as such assertion never came about until after Zahrans' filed suit in 1990. Frankenmuth was therefore, precluded from changing that position after Zahrans filed suit and the attorneys did not reply, and accordingly and waived Zahrans' rights for an objection pursuant to the rights that have been established as of the date of incident and claim. *Gryms v. Sanders*, 93 US. 55 236 E.D. 789. *Globe Mutual of U.Y. v. Wulff*, U.S. 326 24 L. Ed 387, holding that conduct after breach indicating election to treat policy as valid keeps policy valid. *Pence v. Langdon*, 99 U.S. 578 25 L.Ed 420, holding that when a company is advised of wrong, they must decide immediately either to affirm or to deny otherwise, they will loose their right to rescind and must seek compensation in damages.

The lower courts misapplied Wis. Law referencing reliance on misrepresentations in a proof of loss as declared in the *Templis Case,* which held that Wis. Statute 631.11(1)(b)(1) referencing reliance allows for the a voiding of policy coverages misrepresented in a proof of loss **if such misrepresentation is material and if only the policy language provides for violence of coverage.** *Northwest Natl v. Nemetz*, 400 N.W. 2d 23 135 Wis. 2d 245. *Templis v. Aetna*, 164 Wis. 2d 17, 473 N.W. 59, (91)

Zahrans' policy provisions referencing reliance specifically stated that nothing would defeat the insureds' rights under the policy for the collection of damages except that if: (1) **we rely on it and** (a) **it is material** or (b) **made with intent to deceive.** Kmiec's expert testified that Kmiec failed to make that argument on reliance, estoppel and waiver and that an objection at trial should have been made if the issue was going to be raised at trial. Zahrans' attorneys waived Zahrans' defenses pursuant to policy provisions and Wis. Statute and Wis. Law declared through the Wis. Supreme Court decisions as pointed out in this petition of which the circuit panel are refusing to want to recognize in contradiction of Wis. Supreme Court decisions and Wis. Statutes.

Wisconsin Supreme Court decision, in the *Templis Case* Wis 2d 1 485 N.W. 2nd (1992), declared the state doctrine referencing insurance claims in that an insurance company could only void coverages on the items misrepresented and must pay the items that were not. Frankenmuth's policy did not provide for voiding policy absence of reliance. Wis. Supreme Court in *Templis* declared the policy language controls and absence the contractual right to void coverage, in absence of reliance, coverage cannot be denied nor voided. *Templis (i.d.), citing Folk v. Natl Ben Franklin Life*, 45 IL 3d 595 359 N.E. 2d 1056-57 (1976)

This court held that a judgement should be entered against a party who fail to make a showing or to establish the existence of the elements of that parties claim which must be

proved at trial. All what the Defendants in this case had to do was to plead for the dismissal of Frankenmuth's pleadings in its defenses and counterclaim upon its failure to prove the element of reliance contained in its pleadings- a fact found by the district court, (Judge Curran) but waived it. *Celotex Corp. v. Catrett*, 477 U.S. 317 322 106 S.C.T. 2548 25529 L. ED 265 (1986)

Judge Clevert's rulings and his affirmation on appeal contradicts the 7th Circuit's own declarations, rulings, and findings on March 28, 1994 and in violation of this court's published law. *Celotex Corp. (i.d.)* - Appended p.1-13

This Court had always held and declared that the federal courts must defer to the opinions of local tribunals and bodies as they are in a better position to judge and legislate their own affairs. *Schmidinger v. Chicago* 226 U.S. 578 57 L Ed 364.33 S.C.T. 182. Accordingly, a statute or a court order that limits the state powers will be unconstitutional and void. *State v. Sensenbreaner*, 262 Wis. 118 53 N.W. 2d 773, *Chicago L.A.R. Co. v. Tranbarger* 238 U.S. 67 59 L.Ed 1204 35 S.C.T. 678. *Hammer v. Dagenhart* 247 U.S. 251 62 L Ed 1101. S.C.T. 529 3 ALR 649. The lower court's actions and decisions in this case fall exactly under these admonishments.

4.

THE COURTS BELOW DEFECTED FROM THE BASIC AND NORMAL COURSE OF JUDICIAL PRODEEDINGS RESULTING IN THE CONFISCATION OF PETITIONERS' CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION PURUSANT TO THE 14TH AMENDMENT AND VIOLATION OF THEIR RIGHTS TO DUE PROCESS PURSUANT TO THE 5TH AND 14TH AMENDMENT OF THE CONSTITUTION

A. The Lower Court and Appeal Court Panel Were Improperly Assigned, Constituted, and Disclosed.

Upon Judge Gordon's withdrawal, the case was assigned to Judge Clevert without random assignment in violation of the local rule of the Federal Court in Milwaukee,

Wisconsin referencing assignment of cases. (Sec.4.01 of local rules, and (28 U.S.C.{137), nor did Judge Clevert recuse himself due to his familiarity pursuant to (U.S. Code 455) with the facts and witnesses and may have been already prejudicial.

Upon appeal, the case was assigned to a panel of appeal court judges that were improperly constituted and disclosed, in violation of the 7th Circuit Rules, sec. 3 of the 7th Circuit published rules which states that the judges will be assigned by random and that, "the identity of the three judges on any panel is not made public until the day the cases are argued. An exception to this procedure occurs when a previously argued case is on the docket for a subsequent hearing. In this situation the original panel may be reconstituted to hear the second appeal."

None of the original panel members in the original appeal participated in this appeal. The Constitution of these panel members were predetermined and served to deprive Zahrans of due process and the equal protection under the 14th Amendment in lieu of their views referencing Zahrans in the other dispute. This assignment brings to Zahran's attention what Attorney Cohen had referenced that no fair hearing before this panel will occur which prompted him to file a petition with the Supreme Ct. for disqualification of the panel members due to their known demonstrated prejudice against Zahrans, in direct violation of the U.S. Constitution. Appended p. 116

B. The Lower Courts Misapplied the Law In Effect Overriding the Erie Doctrine by Discarding Wisconsin Law to Achieve a Predetermined Order and Judgement

The decision of the lower courts were in conflict with the decisions of the U.S. Supreme Court declared in the Erie Doctrine which held U.S. Courts sitting, pursuant to diversity jurisdictions, must apply the law of the forum state as declared by that particular state statute and interpreted through it's Supreme Court decisions. *Erie & Co. v. Tompkins*, 304 U.S. 64 1 E.D. 118 858 S.C. 817.

This doctrine is rooted in the 14th Amendment of equal protection and relates to the police powers of the states in this case. The lower courts displaced the law of the State of Wisconsin and inserted their own without support of legal precedence which is in direct violation of the U.S. Constitution. In fact, their actions were in violation of this Court's declared rulings and the U.S. Constitution because when the federal courts are called upon to solve disputes between parties based on diversity or called upon to adjucate issues upon a particular state law, they should and must very cautiously,extremely and carefully exercise their powers over contracts between parties which are subject to state statues or regulations. Federal courts have no power to take the power of the legislate from the states, or to supervise the state regulations and statues established under the state power because these statutes and laws are beyond interference by the federal government except by Constitutional authority. *Federal Power Co. v. Natural Gas Pipeline* Co. 315 U.S. 575 865 L Ed 1037 62 S.C.T. 736.

Judge Clevert and the panel members totally ignored Wis. Law referencing reliance, estoppel, innocent insured, policy provisions governing the contract between the parties and Wis. Statute (631.11(1)(b)) and Wis. Supreme Court decisions as outlined in this petition. This Court mandates, referencing the state powers which calls for this Court to exercise its supervisory power over a court that showed disregard to the rule of law and the authority of the supreme court of the land.

The courts may not unreasonably invade private rights or interfere with personal liberty or contractual obligations. *Kingsley International Pictures Corp. v. Regents of the University* 360 U.S. 684 3 L Ed 2d 1512 79 S.C.T. 1362 As such infractions would be a violation of the right guaranteed under either the federal or state constitution and can't be sustained. *Mayer v. Nebraska* 262 U.S. 390 67 L. Ed 1042 43 S.C.T. 625. Zahrans researched and dug deep to their very souls to come to the grips of what happened and seeking justice and hope to get it through this Court.

C. The Lower Courts Violated Zahrans' Rights of an Opportunity to be Heard

The panel decision and rulings were clear violations of Zahran's constitutional rights to basic justice and a fair opportunity to be heard on the issues without prejudice- a violation of their 5th and 14th Amendment of equal protection and their rights of due process pursuant to the Amendments. *Panhandle Geastaran Pipeline Co. v. State Highway Comm.* 294 U.S. 613 79 L. Ed 1090 55 S.C. T. 563

D. The Deprivation of Zahrans' Right to Appeal

The Defendants huge amount of costs and copying expense were charged at a much high rate than what is normally allowed in the 7th Circuit jurisdictions and by Judge Clevert himself when he approved costs in another matter relating to this case. The costs were inexcess and were in violation of the U.S.C. {920 Statute but was affirmed by Judge Clevert and the appeal panel.

The appeal panel affirmed the Bill of Costs without seeing the record as demonstrated, in fact, this entire case seems similar to *Alice in WonderLand.* Yet, the panel stated in their decision that the record was inspected at the time the district court record shows it was not even submitted to the appeal court. One must question the accuracy of their decision as a whole in lieu of their statements. One must further question and relate back to Attorney Cohen's statements referencing the predetermined thoughts of the appeal court panel and Judge Clevert striking of Zahran's jury demand, a question these petitioners don't care to find out its reasoning nor will speculate

E. Prejudicial and Abuse by the Lower Courts

In a recent decision by Judge Clevert which is related to this case, Zahrans objected to certain of the deposition transcripts bill of cots, Judge Clevert stated: " It was prudent for Cleary to take Zahran's depositions. Indeed, it would have been shocking if it had failed to do so." Judge Clevert chose

not to be shocked by the attorneys negligence and carelessness when they failed to ask questions or carry discovery on the very serious acqusations and allegations made by Frankenmuth that Zahrans committed fraud, an accusation that proved devastating to Zahrans entire life because they pursued to find the truth. Zahrans wish that no others may ever suffer from such fate at the time they believe and truly know they were innocent and made guilty of fraud through accusations and manipulations of the insurance company's designs and their attorneys' negligence.

At the trial and on many occasions, Judge Clevert was loud, mad, and threatening to hold Karen Zahran's attorney in contempt of court for voicing an objection. He was mad enough to leave the court room on a few occasions to calm down. With such behavior and with Judge Clevert's knowledge of many of the witnesses and the opposing attorneys and the evidence in the three cases that were before him involving Zahrans, some of which share the same witnesses and facts, he should have recused himself pursuant to U.S. code 455 U.S. Code U.S.C. § USS.(b). (R.90), because the appearance of impartiality is enough reason for the judicial officer to rescue himself as held by this Court. *Liliebery v. Health Services Acquisitions Corp.*, 480 U.S. 915 (1987) *Dotty v. Seawall*, 908 Fed. 2d 1053, as Zahrans were entitled to a nonpartial and a non-bias judge, pursuant to the 14th Amendment rights to equal protections and right to due process, nor could Zahrans believe that the striking of the jury demands was not a premeditated intentional act by Judge Clevert.

E. The Court Curtailed Zahrans From Introducing Evidence Relative to Proofs of Case

Zahran wanted to call the main named witnesses from the original case to prove there was inadequate and improper cross-examination by Kmiec, and fraud and conspiracy by Frankenmuth which would have changed the outcome of the original case. *Beech Aircraft Corp. v. Rainy*, 488 U.S 153 102 153 102 LEd 2d 445 109 S.C. 439.

Judge Clevert denied Zahrans their right to put a case within a case to prove their contentions. Judge Clevert schooled and interfered with the evidence production resulting in depriving Zahrans of their basic rights to due process where many court cases in the 7th Circuit jurisdiction hold that the 7th Circuit case law referencing legal malpractice cases hold that the best evidence in malpractice cases is the evidence of what happened in the original trial . *American v. Galvin (i.d). U.S. v. Grunther,* 631 Fed. 2d 583 587.

Judge Clevert's position, on the underlying case is "that case is gone," but the case within a case can't be proven until a party is allowed to prove the case in the underlying case including the use of witnesses, and other proofs. *U.S. v. Foskey,* 636 Fed 517 524 N.E.

Wis. Supreme Court declared rule on legal malpractice cases is clear and must be followed, **"that regardless of the approach used, the ultimate goal to be to determined in legal malpractice case ought to be what the outcome should have been if the issue had been properly presented in the first place."**

F. Sanctions

The appeal court sanctions directing Zahrans not to file any action in the court against any one until further permission of the court is a violation of Zahrans' rights and due process under the 5th and 14th Amendment of the U.S. Constitution. It clearly demonstrates that order of the panel's prejudice and an infringement of basic rights to access to justice that calls for this court's interference and supervision.

The issue here is whether the appeal court is exercising revenge against Zahrans in taking away Zahrans' civil liberties and the rights to redress in satisfaction of the appeal court determination that Zahrans should accept their fate through verdict that was begotten by fraud and deceit and illegal means and accomplished through the negligence of their attorneys on matters that may not relate to issues that could rise either in the coming two (2) years or later that have nothing to do with the

litigation of Frankenmuth Insurance Company or these Defendants.

The appeal court order that Zahrans not file papers for two(2) years or risk contempt proceedings at the time the court ordered in the Appendix p. 79 that Zahrans' affidavit should set forth facts showing that the pattern of vexatious litigation in which Zahrans have been engaged to date will reoccur if the petition is granted, is nothing but a permanent order to keep the courtroom door closed forever as Zahrans can't and won't be able to state such statements in their affidavit.

And when combining that order with the different treatment referencing the acceptance of the supplemental briefs, and giving Zahrans no ability to retrieve their records from Attorney Cohen to prepare their appeal briefs which deprived them of filing their briefs timely because they were 5 minutes late and the granting of the appellee's briefs to file their briefs instanter evidences the bias and prejudice the appeal court had towards Zahrans of which they believe the appeal court judges are either not reading the record and the briefs or are acting pursuant to some other motive, or rules that Zahrans never seen nor know about with all the research they have made referencing these issues over the last few years.

5.

KMIEC'S ALLEGED AMENDED CONTRACT OF REPRESENATATION

Robin Zahran, under duress and pressure from Judge Curran to settle, told Kmiec he wants to prosecute the case through appeals and did not want to settle pursuant to Frankenmuth's offers. (noting to Kmiec that he would pay him $20,000- win or loose meaning all the way to the Supreme Court.

After the trial, Kmiec quit and did not pursue the case on appeal. He had no right to the promise as there was no consideration or performance, nor was the original agreement amended, nor did Karen Zahran agree to such alleged

agreement and commitment as was testified by Karen. Kmiec, at trial, admitted that the alleged note of $20,000 is nebulous as a consideration. Judge Clevert's rulings is erroneous and baseless, especially as to Karen Zahran.

It is a well established law that all transactions between an attorney and his client during their relationship are closely scrutinised and an alleged contract made after the relationship started will be construed strongly against the lawyer. *Elmore v. Johnson,* 143 IL 513 32 N.E. 413. There was no consideration received by Robin Zahran for this alleged promise, nor did she agree or was a party, nor was Karen Zahran involved for this alleged promise and thereof such alleged promise is void for non-performance by Kmiec. Even if Robin Zahran were to agree, it was mad under duress and therefore would be held invalid, pursuant to this Court declared findings. *Tayor v. Bemiss,* 110 U.S. 42 28 LEd 643 S.C.T. 441.

CONCULSION

For all the above reasons, Robin and Karen Zahran pray that this Honorable Court grant their Petition for Writ or order that Zahrans' case be remanded for a jury trial and further, the appeal order sanctions, which in effect close the courthouse door on them forever, be lifted due to their inability now or at anytime to be able to draft an affidavit stating under oath as the appeal court stated in the affidavit, IT IS FURTHER ORDERED.....Any petition shall include a detailed affidavit ..... The affidavit should also set forth facts showing that the pattern of vexations litigation in which the Zahrans have engaged to date **will reoccur** if the petition is granted.

Respectfully submitted,

10-99

Robin Zahran

Karen Zahran

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued November 1, 1993
March 28, 1994
Unpublished Order Not to be Cited Per Circuit Rule 53
Before
Hon. **William J. Cummings**, Circuit Judge
Hon. **John L. Coffey**, Circuit Judge
Hon. **James B. Zagel**, Circuit Judge*

ROBIN ZHARAN and KAREN ZAHRAN,	)	Appeal from the United
Plaintiffs-Appellants,	)	States District Court for
Cross-Appellants	)	the Eastern District
No. 92-1778 and 92-1848	)	of Wisconsin
v.	)	
FRANKENMUTH MUTUAL INSURANCE COMPANY,	)	No. 90 C 337
Defendant-Appellee./ Cross-Appellant	)	Thomas J. Curran, Judge

ORDER

Robin and Karen Zahran insured their farm buildings and property located in Denmark, Wisconsin. On May 24, 1989, a tornado struck the farm damaging barns and other equipment. Adjusting the claim was an arduous process and neither the Zahrans nor their insurer, Frankenmuth Mutual Insurance Company, were satisfied with the outcome. The Zahrans sued for over $537,000 for property damages and consequential

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* The Honorable James B. Zagel, District Judge for the Northern District of Illinois, is sitting by designation.

damages, plus interest, attorney fees and costs. Frankenmuth eventually counterclaimed seeking to get back the $182,888.37 it had paid because, it said, the Zahrans wilfully hid or misrepresented material facts about their claim in order to deceive Frankenmuth. Jurisdiction was based on diversity of citizenship, so Wisconsin law applies.

A jury decided against the Zahrans and, in special verdict, ruled that the Zahrans transgressed the policy provision barring misrepresentation and fraud in claims. The district court entered judgment for defendant, denied the Zahrans' post-trial motions and ordered them to pay Frankenmuth costs. The Zahrans appeal this. Frankenmuth, in turn, appeals the district court's dismissal, without prejudice and without costs, of the Frankenmuth counterclaim.

There is a lot of detail in the facts of this case, all of which we have examined, partly because the Zahrans, who had lawyers at trail, proceeded without counsel on appeal and sought to retry the case before us, even to the point of citing evidence which was stricken by the trial court. We spare any non-party who happens on this opinion the burden of reading them, and the parties need no further recital.

The Zahrans say the verdict was contrary tot he evidence. This is a hard case to make. A reasonable basis for the verdict is all that is required. A jury may decide for a party with what, on the cold record, appears the weaker evidence. Tryzcinski v. American Cas. Co. 983 F.2d 307,315 (7th Cir. 1992).

What Frankenmuth sought to show was that the Zahrans claim was unworthy of belief.* The Zahrans said they simply

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* There is a spat over whether Frankenmuth had to show that it relied on misrepresentations in order to defeat the Zahrans' lawsuit. Frankenmuth did not. Tempelis v. Aetna Cas.

secured repair estimates from reputable contractors to defeat Frankenmuth's estimates. They did not prepare the estimates (more precisely, they say they "did not directly participate in [their] preparation:" and, if there were misrepresentations in them, they are not to be laid at the Zahran's door. Yet, Frankenmuth had evidence, which a jury could choose to believe, that Robin Zahran asked one estimator to quote, over the phone, a price for repairing one slurry tank ring and to the so without inspecting the damage; Robin Zahran then doubled the estimate and submitted a claim for two rings. On another occasion, Robin Zahran secured estimates of replacement cost for a seller of buildings who did not believe that replacement was necessary. A jury could infer that replacement cost rather than repair cost was used because Robin Zahran asked for it directly or implicitly.

Then there is evidence that total loss was claimed on barn 151 when Robin Zahran had an estimate for a much lower cost repair. When Robin Zahran claimed barns 152 and 154 were demigod, which he did not do until September 1989, nearly six months after the tornado, he said he had a written report from a structural engineer stating that barns 151 and 152 were unsound and total losses. This was untrue. A structural engineer did visit the barns, but did so in December 1989 and never prepared a written report. There was evidence that barn 154 was undamaged. One contractor testified that when he was talking to Robin Zahran about how the big barn could be

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& Sur. Co., 473 N.W. 2d 549 (Wis. St. App. 1991), aff'd and modified on other grounds, 485 N.W. 2d 217 (Wis. 1992). The spat is pointless because the Zahrans did not object to a jury instruction which excluded reliance as an element of the defense. Fed. R. Civ. P. 51; Sims v. Mulcahy, 902 F.2d 524, 525 (7h cir. 1990)

repaired, Robin Zahran told him "Stay out of it . I am going to get the insurance company to put me up a new barn . . . this is my showplace. Later Zahran called the contractor "several times a day any time of the day" and threatened to sue him if he repaired the barn.

Robin Zahran also claimed that a slurry tank pump was damaged. Later he learned it was undamaged but never notified Frankenmuth to withdraw that claim. There were photographs of the barns and the slurry tank which could have supported a finding that the tornado damage was no nearly so grave as the Zahrans claim. Finally, insurance and annuities as his principal occupation. He may not have been an expert on property and casualty insurance, but he had made property loss claims for himself, and a jury could believe he was not an insurance naif.

There is clearly enough here for a jury to reach a decision against the Zahrans.* We do not say the verdict was

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* The Zahrans argue they should not be treated as a collective entity. Whatever Robin Zahran may have done, there is no evidence that Karen Zahran did anything wrong. There are Wisconsin cases which allow an innocent insured to collect for damage intentionally caused by another insured. Hedtcke v. Sentry Ins. Co., 326 N.W. 2d 727 (wis. 1982). Whether that doctrine would apply here is open to question, and we do not have to answer. The Zahrans never presented this argument to the trial court during or after trial, never raised it in defense to the counterclaim, did not object to instructions referring to themselves collectively and referred to themselves collectively in closing argument. There is, incidentally, a good reason why the innocent insured argument was not made. In Hedtcke, the court noted that the trial court would have the authority to see that the wrongdoer insured would not benefit from the proceeds; something easy to do in the Hedtcke because the

inevitable. The Zahrans had something to say in their favor on most of the incidents brought up by Frankenmuth. It was up to the jury to decide whom to believe and what inferences should be drawn from the circumstances of the case. There is no reason to believe that this jury, or any jury, would not give a farm owner a fair shake in a dispute with their insurance company.

The Zahrans rely on Omaha Paper Stock Co. v. California Union Ins. Co., 262 N.W. 2d 175 (Neb. 1978), which held that an insurance company is equitably estopped from asserting misrepresentation in proofs of loss where the insurance company failed to have an expert engineer of its own choosing appraise the damage. A Wisconsin court has cited Omaha Paper and observed that Nebraska, (and only Nebraska), unlike Wisconsin, requires an insurance company to show that it relied on misrepresentation in proof of loss. See Tempelis, 473 N.W. 2d at 552. So we doubt that Wisconsin would adopt Nebraska's rule. And even if it did, it would mean nothing here for two reasons: 91) Frankenmuth did send its adjuster to examine the premises within days of the tornado and others came later, and (2) the Zahrans did not pursue the argument in

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guilty insured was hostile to the innocent insured and may have damaged the property to hurt her. (Judith Hedtcke, the innocent insured, had vacated the marital home, initiated divorce proceedings and obtained a court order directing Ronald Hedtcke to vacate the premises. Ronald, who later pled quilty to arson, burned the property three days before he had to vacate it). We do not see how it could be done in this case, and we suspect that the Zahrans' counsel also did not see how Karen Zahran could be paid without conferring some benefit on Robin Zahran.

the trial court, offered no instruction, and sought no jury findings of fact which would support application of estoppel.

The Zahrans cannot prevail here on the argument that the verdict was wrong. But they do make further claims that the trial was unfair and they ought to have the matter retried. The special verdict form, say the Zahrans, misled the jury into believing that an overvaluation of one item in the proof of loss would void the whole policy. this objection was made at trail, but not until the jury retained to deliberate and the district court ruled, as it could reasonable do, that the objection came too late. This argument is waived.*

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* It is also unpromising since the insurance contract states, unambiguously, that the "entire policy is void" is "whether before or after a loss" the insured has wilfully concealed or misrepresented any material fact or circumstance concerning the insurance or its subjects. In dicta the Court of Appeals of Wisconsin said that such a provision 'clearly puts the insured on notice that [post-loss] representations made by them can serve to void the policy." Tempelis v. Aetna Cas. & Sur. Co., 473 N.W. 2d 549, 554 (Wis. Ct. App. 1991). This dicta was echoed, although with less force, when the Supreme Court of Wisconsin affirmed and modified the court of Appeals judgement. Templis v. Aetna Cas. & Sur. Co., 485 N.W. 2d 217, 221-22. The Supreme Court also suggested that, where the misrepresentations covered a very small part of the claim, it might not enforce the contract provision, i.e., a fraudulent receipt for a $50 dinner might not void a $2,000.000 claim for the destruction of a home. That is not this case. And Wisconsin has not abandoned its rule that when faced with a clear insurance contract it will "merely apply" its terms according to their everyday meaning or policy definition. Kremers-Urban Co. v. American Employers Ins. Co., 351 N.W.

The Zahrans say the jury was allowed to equate innocent overvaluation with fraud. But he jury was told, without objection by the Zahrans, that "an exaggeration of value as mere opinion, a mere misstatement based upon an erroneous estimate of value, and honest mistake, an innocent overvaluation lacks the essential element of fraud and does not operate to void the policy." To find fraud a jury would have to find more than exaggerated opinion, erroneous estimate, honest mistake and innocent overvaluation. This is fair. Indeed, as to "exaggeration," one could read Lykos v. American Home Ins. Co., 609 F.2d 314, 316 (7th Cir. 1979) (Illinois law), to say that the instruction was more than fair.

The Zahrans next assign error to several evidentiary rulings. Frankenmuth wanted to prove that it paid the Zahrans for a fire loss at barn 151 which occurred on July 6, 1990. The district judge ruled the evidence inadmissible. There might be an inference that the Zahrans were suing to recover for property damage for which they were later compensated. The evidence may have been admissible for just this purpose if the barn had not been substantially rebuilt after the tornado. But we do not know if this is so because the district judge permitted only brief reference to the matter on cross-examination and then only to impeach credibility. When Robin Zahran testified, he was asked on cross-examination, without objection, whether he had made a fire loss for barn 151 in November 1990. He answered a later question , again without objection or motion to strike, that "75 is not correct" and that "151 did not have $75,000 for what you're talking about." With the court's permission, Frankenmuth showed Robin Zahran a draft of $75,000 for the fire loss on barn 151, when he admitted receipt of payment for barn 151. That was the end of the matter. It was within the

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2d 156, 163 (Wis. 1984)

discretion of the court to permit this to impeach Robin Zahran's credibility in light of Zahran's denial of receipt. There is no error.

The Zahrans wanted to prove that Frankenmuth was considering making an offer of an additional $25,000 to "resolve [the] entire matter." This, they argue, showed bad faith by Frankenmuth in making a 'low-ball" offer. There are barriers to admission of the evidence. Thinking about an offer is not the making of an offer and, if Frankenmuth did not actually make an unconscionable proposal, the evidence proves nothing here but that one Frankenmuth employee had questionable thought on which neither he nor his employer acted. Rule 408 would exclude from evidence an offer, had it been made, as the district judge ruled. Most importantly, there was no assertion at trial that this evidence was being offered in support of the bad faith claim. In the end, all that the Zahrans' counsel said was "I'm offering it simply to show that an offer was conveyed to Mr. Mours [Frankenmuth adjuster] by Mr. Spalding [Frankenmuth's claim supervisor]." This does not fairly advise the district judge of the purpose for which the evidence is offered, and so the Zahrans cannot complaint of the failure to admit it.

At some point, the district judge limited each side's testimony. We do not find this ruling in the record, but both sides agreed it was made and Frankenmuth does not dispute the Zahrans' assertion that the limit was nine hours. Both sides agreed the trial was going no longer than necessary. The judge did not want deliberation to occur on Christmas Eve. A judge may manage trials, and we do not intervene in the absence of the unreasonableness. See Daniel J. Hartwig Assocs., Inc. v. Kanner, 913 F.2d 1213, 1222 (7th Cir. 1990). Were we more willing to intervene, we would not do so here. The district court noted that the "time allotted to the plaintiffs has long expired, and I would normally have cut you off except that it

was cross-examination. The defendants still have less than an hour left." The briefs filed here by the Zahrans evidence the need to cabin their presentations, and all that Robin Zahran was prevented from doing was to testify in rebuttal about a document already in evidence. his lawyer admitted "it's in the record. I think it's pretty well in the record. I wanted to introduce the blow-up for the jury for closing argument." Once over the ground was enough here.*

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* The Zahrans make other arguments that are not clearly stated or properly developed. (a) The slurry tank was listed in the policy under the heading "Coverage F - Out buildings, $500 deductible" and insured for $40,000 with a separate premium of $75. The Zahrans contended that they sought to collect only for damage to a portable part of the slurry tank under the blanket coverage for unscheduled personal property. The district judge refused to permit opinion evidence that the part was personal property; the witness was not qualified to given such an opinion and it made no sense to have a separate listing and premium for the slurry tank if it was covered as unscheduled personal property. We do not see how a jury could infer fraud from the court's ruling or its refusal to accept the Zahran's interpretation of a contract.

(b) The Zahrans say they were victimized by opposing counsel who knowingly used the prejured testimony of an engineer who said there was no damage to the slurry tank. But the Zahrans had the opportunity to bring out the defects in the engineer's testimony and, even now, they fail to show how the testimony is perjured (as opposed to mistaken). They simply point to Exhibit Q which is 20 pages of documents and photographs by an adjuster and tell us, without analysis of the document, that this is the proof of perjury. We are not required to comb through these pages and speculate about what is or is

Finally, there is Frankenmuth's claim that the district court erred in not granting judgment in its favor and, instead, dismissing its counterclaim of misrepresentation, concealment or fraud without prejudice to file another action. The district court refused to enter judgment because Frankenmuth did not submit jury instructions or special interrogatories (even after the court requested that they be submitted) and did not litigate whether it was entitled to restitution for the amounts already paid out under the insurance policy. Federal Rule of Civil Procedure 49 says, in part, that when a court instructs a jury to special verdict or interrogatories and omits an issue of fact raised by the pleading or by the evidence, "each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury." Fed. R. Civ. P. 49 (A). Frankenmuth concedes it did not tender a separate instruction for its counterclaim. Frankenmuth, however, says the special written finding that "the Zahrans violated the policy

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not false. This is particularly so where the adjuster says in the Exhibit that the damage did not really show up on the photographs but, with the naked eye, "it does appear as if there has been a twisting effect." This is hardly such unequivocal proof of actual damage that it puts the lie to any contrary opinion. the matter also was not included in the motion for new trial.

(c) the Zahrans complain of late production of documents and a videotape, but cannot tell us which documents they mean or how they were prejudiced by the delay in production. These documents, discovered in another case, are not part of this record. Both the district court and this court have denied the Zahrans" motiors to supplement the record.

(d) A number of claims are made for the first time in their Reply Brief and will not be considered by us.

provision relating to misrepresentation, concealment or fraud by willfully concealing any material fact or circumstance concerning their insurance claim" is a finding as a matter of law that the entire policy is void and entitles Frankenmuth to restitution of the proceeds paid out on the policy. Frankenmuth points to another part of Rule 49 which permits a court to make a finding on the issue submitted or which deems the court "to have made a finding in accord with the judgment on the special verdict." Fed. R. Civ. P. 49(A) But the district court noted it would be unjust for Frankenmuth to get restitution based on misrepresentations, concealment or fraud on proofs of loss which were not required for the preliminary payments of $136,687.74*

"As a general rule, if the insurer pays a loss, being induced so to do by fraud, or by mistake as to the facts which, if it had knowledge thereof, would have been a sufficient defense in an action by the insured upon the policy, the money so paid may be recovered." 18 COUCH ET AL., COUCH ON INSURANCE 2d § 74:191 (REV. ED. 1983); 6 J. APPLEMAN & J. APPLEMAN, INSURNACE LAW AND PRACTICE § 3979 (Mistake) (1972). "[I] f an obligation procured by fraud is paid voluntarily with a full knowledge of the facts, the amount so paid cannot be recovered." 66 AM. JUR. 2D § § 116 E. 122 (Restitution and Implied Contracts) (1973). One could argue that, under these basic principles, Frankenmuth is not entitled to recoup monies paid out on the policy where it did so voluntarily with knowledge from its own experts and investigators of the actual property damage sustained and when, after suspecting fraud, it refused to make further payments. The Zahrans actually suffered some of the

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* The Zahrans also sought reimbursement of an additional $20,274 paid out of the policy

losses claimed, and it would appear just to compensate them for those loses. But Frankenmuth does not base its right to recover on equitable principles. Rather, it seeks restitution based on he plain language of the policy, and we should not be motivated solely by a yearning to see insureds who pay premiums and suffer actual loses collect insurance.*

Given that the jury found a violation of the clear policy provision voiding the entire contract where fraud exists, we can conclude only that the district court erred in denying Frankenmuth the benefit of its bargain and refusing to enter judgment in favor of Frankenmuth on its counterclaim. The Zahrans bargained for the policy and were on notice of the harsh penalties for fraud. They cannot now reasonably claim injustice form mere application of its terms. Moreover, there is very little point to requiring Frankenmuth to file a new lawsuit, the result of which is inevitable given that the only operative and contested fact has been found in its favor and against the Zahrans.

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* See American Home Fire Assurance Co. v. Juneau Store Co., 78 F.2d 1001, 1003 (7th Cir. 1935) ("court [interpreting Wisconsin Standard Fire Insurance Policy] should [] unhesitatingly act to prevent attempted frauds on the part of the insured" even though penalty of voiding entire policy is "heavy and seemingly harsh"). The Juneau court, however, could not enter judgment in insurer's favor because of inconsistent jury verdict. See also Tenore v. American & Foreign Ins. Co., 256 F.2d 791 (7th Cir. 1958) (following Juneau, court held insured could not recover any sum under Illinois policy where provision voided entire policy in case of fraud or false swearing, despite fact insurers did not pay out money and were not deceived by insured's claims).

The district court's order and judgment entered on the jury verdict in favor of Frankenmuth is AFFIRMED. The dismissal of

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WICSONSIN

ROBIN ZAHRAN and
KAREN ZAHRAN,
Plaintiffs, Case No. 90-C-337

v.

FRANKENMUTH MUTUAL
INSURANCE COMPANY,
Defendant.

DECISION AND ORDER

Robin and Karen Zahran, the plaintiffs in the above-captioned case have moved the court for an order granting them a new trial or, in the alternative, for judgment notwithstanding the verdict. See Federal Rules of Civil Procedure 50 & 59. In this action the plaintiffs have sued defendant Frankenmuth Mutual Insurance Company for breach of an insurance contract and for bad faith failure to pay certain casualty loss claims. On December 26, 1991, a jury returned a special verdict finding that the defendant is not liable to the plaintiffs because the plaintiffs made material misrepresentations in their insurance claims.

Having reviewed the evidence in the light most favorable to the defendant, the court concludes that the jury's verdict is not against the clear weight of the evidence. See M.T. Bonk Company v. Milton Bradley Company, 945 F.2d 1404, 1407 (7th Cir. 1991) (standard for new trial). Moreover, the trial was not unfair or infected by substantial error. Without weighting the evidence, the court finds that the verdict is supported by substantial evidence in the record. See Allen & O'Hara v. Barrett Wrecking, Inc., 898 F.2d 512, 515 (7th Cir. 1990) (standard for granting judgment notwithstanding verdict).

Therefore, the court will not grant a new trail or judgment notwithstanding the verdict.

Defendant Frankenmuth has moved the court for judgment on its counterclaim in which it alleges that the plaintiffs are liable to it for misrepresentation, concealment and fraud in connection with their insurance claim. The company seeks $181,912.74, plus interest, costs and attorney fees for its injuries.

Although Frankenmuth demanded a trial by jury on it counterclaim, it failed to submit jury instructions or special interrogatories on the issues raised--even after the court specifically requested that such instructions be submitted. Federal Rule of Civil Procedure 49 provides that if a party does not submit a special verdict question on a particular issue to the jury before the jury retires, that party is deemed to have waived the right of trial by jury on the omitted issued. After the verdict is returned, the court may make findings on the omitted issue. However, the Rule does not contemplate that the court would receive evidence and testimony and hear argument on an issue after the trial is concluded and judgment has been entered. As the plaintiffs point out the defendant did not litigate the issue of whether it is entitled to restitution for amounts already paid out under the insurance policy at issue, so the plaintiffs did not have an opportunity to present a defense. There is evidence in the record that no proof of loss was required for the preliminary payments. Defendant's letter to the plaintiffs, dated August 7, 1989, contains this statement: "As indicated above, these payments total $136,687.74. You will note that there is no Proof of Loss nor is there any release being required or requested for your negotiation of these drafts." In light of this statement the court believes that it would be unjust to enter judgment in favor of the defendant on the counterclaim. Consequently, the court will not grant judgment to the defendant, but will dismiss the counterclaim without prejudice.

ORDER

For these reasons, the court ORDERS that the plaintiffs' motion for a new trial or, alternatively, motion for judgment notwithstanding the verdict (filed January 7, 1992) IS DENIED.

IT IS FURTHER ORDERED that Frankenmuth's motion for judgment on the counterclaim (filed January 3, 1992) IS DENIED without prejudice.

IT IS FURTHER ORDERED that the judgment entered in this action on December 27, 1991, shall be amended to provide that:

> This action came on trail before the Court and a jury, Honorable Thomas J. Curran, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,
>
> IT IS ORDERED AND ADJUDGED
>
> that the plaintiffs Robin Zahran and Karen Zahran take nothing, that their action is dismissed upon its merits, and that the defendant Frankenmuth Mutual Insurance Company recover of the plaintiffs its cots of action;
>
> IT IS FURTHER ORDERED AND ADJUDGED
>
> that the counterclaim of defendant Frankenmuth Mutual Insurance Company is dismissed without prejudice and without costs to any of the parties.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 27th day of February, 1992.

Thomas J. Curran
United States District Judge

insured under a group *life or disability insurance* policy has the same right to request a copy of any document [subject to] *specified in* par. [(c)] (b), *including the certificate.*

SECTION 5.631.11(1) (c) of the statutes is renumbered 631.11 (4m) (b) and amended to read:

631.11 *(4m)*(b) (title) [Signed application or enrollment form for group insurance certificate] *Statement or warranty.* No statement, representation or warranty made by or on behalf of a particular certificate holder under a group *life or disability insurance* policy affects the insurer's obligations under the certificate unless it is stated in the certificate, or in a written document signed by the certificate holder, a copy of which is supplied to the certificate holder or the beneficiary whose rights would be affected.

SECTION 6.631.11 (2) of the statutes is renumbered 631.11 (1) (b) (intro.) and amended to read:

631.11 *(1) (b)* (title) [Effect of] Misrepresentation or breach of affirmative warranty. *(intro.)* No misrepresentation [or] and no breach of an affirmative warranty, *that is made by a person other than the insurer or an agent of the insurer in the negotiation for or procurement of an insurance contract constitutes grounds for rescission of, or* affects the insurer's obligations under, the policy unless [the] *if a misrepresentation, the person knew or would have know that the representation was false, and unless any of the following applies:*

1. *The* insurer relies on [it] *the misrepresentation or affirmative warranty* is either material or [is] made with intent to deceive[, or unless the]

2. *The* fact misrepresented or falsely warranted contributes to the loss.

SECTION 7.631.11 (3) of the statutes is amended to read:

631.11(3) EFFECT OF FAILURE OR CONDITION OR BREACH OF PROMISSORY WARRANTY. No failure

of a condition prior to [the] a loss and no breach of a promissory warranty *constitutes grounds for rescission of ,or* affects [the] *an* insurer's obligations under [the] *an insurance* policy unless it exists at the time of the loss and either

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Note: Italics indicate new material; brackets indicate deleted material

PROCEEDINGS

ROBIN ZAHRAN, called as a witness herein by the Frankenmuth Mutual Insurance Company, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BRUCKER:

Q. Would you state your name for the record and spell your last name for the court reporter, please?

A. Robin Zahran, z-a-h-r-a-n

MR. BUCKER: May the record reflect this is the examination under oath of Robin Zahran taken pursuant to Frankenmuth Mutual Insurance Company, policy number FR 0423155 and also taken pursuant to agreement of the parties as far as switching - - changing dates by agreement of the parties. Is that correct, counsel?

MR. BURRELL: Right.

BY MR. BURCKER:

Q. Where do you live, Mr. Zahran?

A. 718 Acorn Hill Lane, Oak Brook, Illinois.

Q. How long have you lived there?

A. About 10 years.

Q. You live with your wife Karen and your four children?

A. That's correct.

Q. Is this a policy portion - - with a portion of the policy with Frankenmuth Mutual Insurance Company?

A. Yes.

Q. Okay. Could you please identify and circle in red the two barns that you referred to as what you claim is 75,000 and 25,000?

A. 151. (Complies.)

Q. Okay. For the record you have circled unit 151 - -

A. Let me just make sure. Just a minute. Yes.

Q. You have circled unit 151 and unit 154 on Exhibit No. 2; is that correct?

A. Yes.
Q. Okay. The 151 was the two frame two-story barn, 40 by 120; is that correct?
A. Yes.
Q. That's should be 100, not 120, but - - about 100. That should be 100.
Q. So it should be 100 rather than 120?
A. Now, your agent is the one who made the measurement, and when we start thinking about rebuilding it, we made the measurement at about 100, but your agent made the measurement.
Q. Who's the agent you're - -
A. Frankenmuth people came and made the measurement for all this.
Q. Okay. Do you know his name?
A. Frankenmuth insurance inspectors or agents came and measured the whole dimension. So these dimensions are your - your dimensions.
Q. When were they - - Before you took out the policy mean?
A. Yeah, before the policy was taken out.
Q. Okay
A. That's all.
Q. Is there a limit on the number one - - Strike that. Is there a limit of $75,000 on unit 151 which you have circled?
A. Yes.
Q. According to this policy here?
A. Yes.
Q. Okay. And is there a limit of 25,000 on the unit 154 which you have circled?
A. Yes.
Q. According to this policy here?
A. Yes.

Q. Okay. And is there a limit of 25,000 on the unit 154 which you have circled?
A. The milk house barn we call it.
Q. I'm going to show you what has been marked as Exhibit No. 1 at Mr. Finnell's exam under oath. Would you put in there in - - with your green pen, if you could, 151, where 151 is located and - -
A. Tell me what you want me to do.
Q. Just mark in there where the building 151 is located and mark in there where the building 154 is located.
A. Here's 151.
Q. Okay. And where's 154?
A. (Complies.)
Q. Okay. 154 is the - -
A. Milk house barn.
Q. - - what is referred to as the L. shape going out along with the milk house; is that correct?
A. That's correct, the milk house barn.
Q. Have you ever claimed 151 and 154 any other insurance claim?
A. Again, now we had the tornado damage, right. Is this what you're referring to?
Q. Yeah. All I'm asking you, have you ever claimed 151 on any other insurance claim?
A. Other than the tornado.
Q. Okay. You had a tornado in 1989; is that correct?
A. Yes, um-hum
Q. What date? What day of the month was that?
A. May 24. Who would forget a tornado?
Q. Have you ever claimed full coverage for 151 on your tornado claim?
A. Yes.

Q. When I say you claimed full coverage, you claimed the maximum limit under the policy of 75,000 for building 151 as a result of tornado damage; is that correct?

A. My memory does not bring me total, or you know, an idea

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WICSONSIN

ROBIN ZAHRAN and
KAREN ZAHRAN,

Plaintiffs, Case No. 90-C-337

v.

FRANKENMUTH MUTUAL
INSURANCE COMPANY,

Defendant.

Examination of Robin Zahran, otherwise than as a witness upon the trial, taken at the instance of the Defendant, taken pursuant to stipulation, before CHRISTINE A. MORAN, a Notary Public in and for the State of Wisconsin, taken pursuant to the Federal Rules of Civil Procedure, at the Kmiec Law Office, 3741 West National Avenue, Milwaukee, Wisconsin, on the 17th day of May, 1991, commencing at 1:10 p.m. and concluding at 5:05 p.m.

A. Okay. That's where you, Bob Burrell, Frankenmuth and everybody should have realised. You - - of all of them, you and Pat Harmon. We said you don't get paid twice, and you should be a witness in that because I spoke with you about it personally on the farm.

Q. What are you presently claiming as you sit here today? What is Robin and Karen Zahran presently claiming for damages to barn 151 against Frankenmuth Mutual Insurance Company?

A. Right now today we are claiming if the fire paid the 75, if it did not cause additional consequential losses, as you are aware of it, you were served with it, then it becomes a more different issue than the tornado. Remember

when that tornado was in - - this wasn't in. Tornado happened. This wasn't there.

Q. Okay.

A. You did not pay that in November, and at that time Mr. Burrell and I we were communicating on that and he informed you - -

Q. Okay.

A. - - of that. You are informed. You were talking with each other, so what's the big deal?

A. I'm following you okay.

A. Great. I love you.

Q. My next question - -

A. Go ahead.

Q. - - has anything changed now that the fire occurred regarding you claim for damages to 151?

A. Okay. Now, that's ere we are here. Your delay of the 151 on the fire, the way you handled it caused us additional consequential damage, and I believe you speak with the other attorney about it and that's where it is. So you have to deal with that in a separate issue. There are tow separate issues. There's more for you lawyers then. I stated I don't want to get paid twice for the same damage, that's - - period. The rest is your to take care of.

Q. Following your statement you just stated, if you had been paid $75,000 for barn 151 - -

A. Yes.

Q. - - would you still claim 75,000 for barn 151 under the tornado loss?

A. You see, you're taking a simplistic view of this thing because not being able to use the other barn with the milkhouse, with the consequential losses and loss of income is part of the whole scenario, and you have to

understand that, and it was explained to you personally, you and I at the farm.

Q. Let's try to break it down. redundant. I want to make this clear. According to that payment you were paid 75,000 for barn 151 for damages, okay?

A. go ahead.

Q. That's under the fire loss?

A. Yes.

Q. Does that fact that you've got a payment on the fire loss change your claim under the tornado Complaint for - - strictly just for barn 151?

A. You can't take - - okay. Strictly this payment, then what you have a deal with Mr. Kmiec about it and that has to be addressed. That has to be addressed. I stated that to you last July. Why you're playing dumb about it?

Q. I'm not playing dumb.

A. You are playing dumb.

Q. I'm putting it on the record so we know. That has to be addressed with Mr. Kmiec, right?

A. Right. Mr Burrell was instructed to address it with you also.

Q. There's been no amended complaint filed on your behalf in this case, the tornado loss?

A. Again, you have to deal with Mr. Burrell about it.

Q. Mr. Kmiec?

A. Now it's Mr. Kmiec. Before it was Mr. Burrell. Mr.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WICSONSIN

ROBIN ZAHRAN and
KAREN ZAHRAN,
Plaintiffs, Case No. 91-C-808
v.
FRANKENMUTH MUTUAL
INSURANCE COMPANY,
Defendant.

The deposition of ROBERT SPALDING called by the Plaintiffs for examination, pursuant to Order of Court, pursuant to the Federal Rules of Civil Procedure and the Rules of the Supreme Court pertaining to the taking of depositions, taken before Sheri L. Arendt, CSR, a notary public within and for the County of Cook and State of Illinois, at 10 South LaSalle Street, Suite 1600, Chicago, Illinois, on the 30th day of October, 1992, at 9:00 o'clock A.M.
Reported for
LAKE SHORE REPORTING SERVICE, By:
Sheri L. Ardent, CSR

trying to collect twice from an old policy and new policy?

A. I don't ever in my mind frame ever put it in terms of policies. I put it in terms of claims presented, proofs of loss presented, yes.

Q. Have I ever tried to collect twice?

A. Yes, I think you have.

Q. Okay. How do you base your statement?

A. My statement is based upon the fact that you submitted proofs of loss for barn 151 as a total loss twice.

Q. So as you sit here today, you re stating that I demanded payment twice form you, is that correct?
A. I am stating that you filed a sworn proof of loss presenting you legal claim under oath to the company for double payment to barn 151.
Q. When was that legal claim under oath came to you, sir?
A. You show me the document.
Q. Do you remember from memory?
A. The date that the - - which proof of loss are you referring to? the fire loss, yes.
Q. For another payment, is that correct?
A. For a total loss under the fire loss.
Q. Okay. So Robin Zahran expected to get paid $75,000 under one and another - - under the wind loss and another $75,000 under the fire loss, is that correct?
A. That's what your proofs of loss state, yes.
Q. Is this what your knowledge, sir?
A. That's what your proofs of loss that I am testifying to, the documents that you presented.
Q. Sir, I understand. To your knowledge, I am talking about to your knowledge, is this what your testimony today?
A. To my knowledge?
Q. Yes.

MR. FITZPATRICK: I am going to object to that question. He just testified - -

MR. ZAHRAN: His knowledge other than the proofs of loss.

A. You didn't ask me if there is other knowledge. still goes back to proof of loss, proofs of loss, claiming a total loss to barn 151 twice.

MR. ZAHRAN: Q. Now, misrepresentation, what did - -

A. What?

Q. Misrepresentation, what did Robin and Karen Zahran misrepresent to you, sir?

A. They misrepresented that they were entitled to be paid twice on the same barn.

Q. And as you sit here today, you have no doubt whatsoever that they demanded to be paid twice?

MR. FITZPATRICK: I am going to object on the basis of form. go ahead and answer.

THE WITNESS: A Well, it goes back to the proofs of loss. I have no doubt that they submitted two proofs of loss, each proof of loss claiming a total loss to the same barn.

MR. ZAHRAN: Q. Sir, my question is as you sit here today, your testimony today, you have no doubt whatsoever that they demanded to be paid twice for the same barn?

A. Absolutely no doubt.

Q. No doubt?

A. No doubt.

Q. Nobody told you otherwise, is that correct?

A. Nobody told me that they weren't or you weren't trying to, no

Q. Okay. Have you ever read anything different than that?

A. Read anything different?

Q. yes.

A. I don't think I did.

Q. Did you ever read Robin Zahran sworn testimony under oath?

A. No, I did not.

Q. You never did?

A. No, I did not read it.

Q. Were you present when Robin Zahran testimony was taken?

A. No.

Q. You were not?

A. No.

Q. Okay. Now, that concealment - - what did Robin Zahran conceal from you?

A. Robin Zahran and Karen Zahran concealed the fact that they were entitled to be paid twice.

FRANKENMUTH MUTUAL INSURANCE COMPANY
One Mutual Avenue - Frankenmuth, Michigan

October 9, 1989

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Robin or Karen Zahran
% Robert J. Doig
Attorney at Law
1301 West 22nd Street
Suite 714
Oak Brook, IL 60521

RE: Our Claim # 89-10267
Date/Loss 5/24/89
Policy # FR 0423155

Dear Robin or Karen Zahran:

We have received from you two papers which purport to be Proof of Loss under policy number FR 0423155 in connection with an alleged loss of 5/24/89.

We are hereby returning these documents to you and expressly rejecting them as a proper Proof of Loss since they do not comply with the provisions of your policy of insurance with the Frankenmuth Mutual Insurance Company.

Your attention is directed to the following defects in the purported Proof of Loss:

A Proof of Loss which was dated on the 25th of July 1989 has been subsequently superseded by subsequent Proof of

Loss which was received at the Home Office of Frankenmuth Mutual Insurance Company on the 11th of September 1989.

The reason for the rejection of the Proof of Loss received on September 11, 1989 include the following:

a) The items and amounts claimed are not validated or documented by any documentation.

b) The amounts claimed in many of the cases have already been paid.

c) Various articles claimeds are in amounts in excess of the applicable coverage.

Any other Proof of Loss that may be filed by you will be considered an entirely new document and will be accepted or rejected solely in connection with the matters and items contained therein. I would now like to address some of the issues that have arisen during our various phone conversations, issues that have been presented in some of the correspondence which you have forwarded to this office and which now remain a permanent part of our claim file to used as deemed necessary, and also the personal meeting that we had here at the Home Office of Frankenmuth Mutual Insurance Company on the 18th of September 1989. On the issue of the diesel tank and repair, my discussion with Uni-Pump leave me to believe that the amount originally allowed by Mr. Conway was correct.

The amount originally allowed on the chopper boxes in the amount of $5,000 is correct.

The claim for gutters is an amount as I explained to you at the time of our September 18, 1989 meeting had already been paid for and had been included in the various estimates that have been submitted.

The $2,000 in clean up charges was for clean up of contents and the correct amount allowed in view of the policy limits, which had previously been paid on Barn 153. The shingles, which you are claiming $3,900 for, again had already been paid for during the repairs to Barn 151.

The amount allowed for the ventilation system is very generous in view of the limits having already been paid on Barn 153 and $6,473.33 does represent a fair amount and has been paid. As far as the manure tank is concerned, Mr. Earl Wildenberg did not indicate that his estimate of $79,000 was necessarily what needed to be done in order to remedy any problems with the tank. This is to further advise that the tank in question is only covered for $40,000 and although you have made a claim for $15,000 for a pump, you have supplied no documentation to indicate that there is anything wrong with the pump and Mr. Wildenberg indicated that it does not need to be replaced. I have made arrangements for someone in your locale to reinspect the slurry tank to give us further insight on any problems, if any.

As for the $4,628 Brown Electric bill, as I advised you on September 18th, this amount had already been covered in the $100,000 payment for Barn 153.

The conveyor which you have referred to both in writing and at the time of our meting was not damaged according to our inspection.

You have submitted estimates for the replacement of 24 x 40 barn. As you are aware, in studying your policy, we do not insure a 24 x 40 barn, however, this in all likelihood was to be considered as a part of barn 151, which is the wooden two story barn. You have also submitted estimates for the removal and

the replacement of this barn. Our inspection of that barn, including the 24 x 40 addition, has convinced us that this barn can be repaired. As soon as I have the repair figures, I will supply them to you immediately, and I am obviously also willing to immediately pay you for the cost of these repairs.

You have also submitted estimates and made demand for payment for the removal and replacement of the roof of you 40 x 170 warming house. Our re-inspection of this barn leads us to believe that there is no damage which needs attention or repairing.

You have made further claim for additional cows which were allegedly destroyed in the tornado. You have supplied us with absolutely no documentation for these cows. May I remind you that we have already indemnified you in the amount of $4,000 for the death of four cows.

Let me assure you, Mr. Zahran that should I become in the possession of objective information which would require the further indemnification of yourself under the policy of insurance in question, that I will promptly do so.

In conclusion, Frankenmuth Mutual Insurance Company, in rejecting your purported Proofs of Loss, expressly reserves all of it's rights and defenses under the policy of insurance and does to in any way waive compliance with all the terms and conditions of the policy of insurance.

I did advise you at the time of our September 19, 1989 personal meeting of the various portions of your policy which referred to the appraisal section. We also discussed it by telephone on the 4th of October 1989. Should you wish to resolve any remaining conflicts that you feel exists between

yourself and the Frankenmuth Mutual Insurance Company, the appraisal section of the policy clearly explains and identifies the procedures that must be followed.

Either party to the insurance contract has a right to have remaining disputes resolved through appraisal.

Very truly yours,

Robert C. Spalding, C.P.C.C.
Property Claim Unit Manager
RCS/js
Dist. 10/5/89

FRANKENMUTH MUTUAL INSURANCE COMPANY
One Mutual Avenue - Frankenmuth, Michigan

October 18, 1989

Robin or Karen Zahran
% Robert J. Doig
Attorney at Law
1301 West 22nd Street
Suite 714
Oak Brook, IL 60521

RE: Our Claim # 89-10267
Date/Loss 5/24/89
Policy # FR 0423155

Dear Robin or Karen Zahran:

I am enclosing at this time a copy of the report and estimate as submitted by Mr. Orvil Krueger pursuant to the damage to both your wood two-story barn delineated as barn No. 151, and also as it pertains to damage to the warming barn or barn. No. 152.

As you can see if Mr. Krueger's observations, he does feel that part of the damage to your barn is not wind related and refers specifically to the situation where the barn is hanging over the sidewalk and also leaning endways. You can see in his observations the reason that he questions this.

Further, you can see where he is estimating that he can repair the wind damage to the wood two-story barn and also do some minor masonry work to the warming barn for a total of $5,274.00.

The remaining work for what Mr. Krueger feels is not wind damage, can be completed possibly for $1,000.00 if all he has to do is jack one side of the barn and possibly as much as $10,000.00 if he has to jack the entire end of the barn and anchor it together.

Although Mr. Krueger does not feel that the additional $1,000.00 or additional $10,000.00 is necessary to correct wind damage, in order to give you the benefit of the doubt, I am enclosing with this correspondence a draft in the amount of $6,274.00 to represent the $5,247.00 for wind damage to both the wooden two-story barn and the warming barn and also the $1,000.00 that may completely correct the other problems referred to.

You are free, of course, to hire anyone of your choice in order to have these repairs completed including, of courts, Mr. Krueger. It is, however, your responsibility to see that the repairs are made and Frankenmuth Mutual Insurance Company cannot undertake directly any repairs to your property.

I hope by now that we have had an inspection completed on your slurry tank and as soon as I receive the results of this inspection, I will be back in tough with you immediately.

Very truly yours,

Robert C. Spalding, C.P.C.U.
Property Claim Unit manager
RCS/cw
Dict. 10/16/89

November 2, 1989

Mr. Robert Spalding
Frankenmuth Mutual Insurance co.
One Mutual Ave.
Frankenmuth, Michigan 48787-001

RE: Robin and Karen Zahran
Claim No. 89-10267
Date of Loss 5/24/89
Policy # FR 0423155

Dear Mr. Spalding,

You have previously received from me the approval from Morton Builders, to restore the barns to their original condition as to before the tornado, in excess of $140,000.00 which does not include electrical work, block wall repair and extra charges to cap barn walls with concrete.

Since Mr. Orvil Krueger has submitted to G.A.B. and you a proposal contract to restore the barns to their original condition as to before the tornado for $5274.00, and there is no way the figure from Morton Builders comes close to Mr. Kruegers proposal, please fix the barns immediately as we are in the Winter season already and you secured a contract with Mr. Krueger to do so.

Again, I state that the building must be restored to their original condition as to before the tornado. Absolutely nothing less than that condition will be acceptable.

Sincerely,
Robin Zahran

PS Morton Builders will adjust the $140,000.00 because the actual sq. footage is greater than they originally based their appraisal on.

FRANKENMUTH MUTUAL INSURANCE COMPANY
One Mutual Avenue - Frankenmuth, Michigan

November 8, 1989

Robin or Karen Zahran
718 Acorn Hill Lane
Oak Brook, IL 60521

RE: Our Claim # 89-10267
Date/Loss 5/24/89
Policy # FR 0423155

Dear Robin or Karen Zahran:

With this correspondence I will confirm receipt of two faxed letters both under the cover of November 2, 1989 on this particular matter.

In regard to the question of appraisal, I am enclosing with this correspondence photo copies of the Appraisal Section of your policy. As you can see, demands for appraisal must be made in writing and, likewise, the naming of the appraiser must be in writing.

As I have explained to you in the past, it is the position of Frankenmuth Mutual Insurance Company that they have idenmified you for your loss of May 24, 1989. Should you disagree with the indemnification received, as has been pointed to you both personally and in writing in the past, the policy does have an Appraisal Section to which you may turn in an attempt to try to resolve remaining differences.

Accordingly, should you disagree with the amount of indemnification that you have received, please advise Frankenmuth Mutual Insurance Company in writing of your wish or demand for appraisal and also advise us of your appraiser. We will then respond accordingly pursuant to the contract.

As to the issue on Barn No. 151, you were advised under cover of October 18, 1989 of exactly what was wrong with your barn both of a wind and nonwind nature and also advised in writing of what should be done to correct and rectify the situation. It is now your responsibility to see that what is necessary to repair the barn in question is done as quickly as possible. Failure to do so should further damages occur and should these damages arise out of your failure to have the repairs made as delineated could seriously jeopardize your insurance coverage. You have also been paid to have these repairs done.

As has also been explained to you previously, Frankenmuth Mutual Insurance Company does not undertake repairs. Our contractual obligations to you are to indemnify you for loss. We do not, however, undertake direct repairs to damaged property. That remains your responsibility. Neither Frankenmuth Mutual Insurance Company nor the General Adjustment Bureau has entered into any contract for repairs with Mr. Orvil Krueger. Mr. Krueger's proposal was submitted to the General Adjustment Bureau.

You have advised me that Mr. Krueger does not wish to repair your barn. I am sure there are other barn repair people who may be interested in repairing your barns along the lines that Mr. Krueger has proposed. As I am sure you are aware, the previous proposals that you have given us from the Morton people have nothing to do with repairing your barns but simply

to rebuild new barns. In view of an experienced barn builder's opinion on repairs such as Mr. Krueger has given us, the Morton proposals are unacceptable. I am also convinced that Mr. Krueger's proposals in regards to the repairs of your barns is legitimate and will stand up to any technical scrutiny.

I will trust that that makes our position clear.

Very truly yours,

ROBERT C. SPALDING, C.P.C.U.
Property Claim Unit Manager
RCS/cw
Dict. 11/6/89

THOMAS W. GOOCH & ASSOCIATES
ATTORNYES AT LAW
209 SOUTH MAIN STREET
WAUCONDA, ILLINOIS 60084
(708) 526-0110
August 9, 1996

Mr. John H. Bickley
Bickley & Bickley
Carbon & Carbide Building
230 N. Michigan Avenue
Chicago, Illinois

Re: Zahran v. Schmidt, et al.
95 C 0334

Dear John:

This letter constitutes my opinion at the present time regarding the issues raised in your malpractice action by Robin and Karen Zahran. The opinion may be modifiable or subject to supplementing it upon receipt of further documents relating to the underlying cause of action. My opinion to date is based on an examination of the jury instructions submitted in the underlying cause of action, an interview with Robin Zahran, the pleadings in the underlying cause of action to the extent I have received them, and the transcripts prepared in the underlying cause of action to the extend they were furnished me.

First, I am of the opinion, with a reasonable degree of legal certainty, that an irreconcilable conflict of interest arose during the representation of both Robin Zahran and Karen Zahran by the defendants. This conflict arose when the defendants first became aware that the insurance company was raising

allegations of fraud and misrepresentation by Robin Zahran in the preparation of his various loss documents. Due to the existence of the "innocent spouse rule" in the state of Wisconsin, representation by the same attorneys of both Robin and Karen Zahran became impossible when fraud allegations were raised by the insurance company in the underlying cause of action. Rather than withdrawing from representation of either of the Zahrans, the defendants continued to represent both of the Zahrans could not in any way reconcile the conflicts between Robin Zahran and Karen Zahran due to the innocent spouse rule. At the time the insurance company raised the fraud and misrepresentation issues, Karen Zahran had an absolute defense to those issues and should have been represented by a different attorney. By continuing to represent both Robin Zahran and Karen Zahran, the defendant attorneys in this cause ignored the defenses that she had as a co-insured and concentrated their efforts on the defense of Robin Zahran resulting in no recovery whatsoever by Karen Zahran.

Secondly, I am of the opinion with a reasonable degree of legal certainty, that the defendant attorneys failed to plead and prove that the insurance company in the underlying cause of action relied on the representations of Robin Zahran. The record is devoid of any discovery undertaken by the defendant attorneys on behalf of Robin Zahran to prove that the insurance company actually relied on the statements of Robin Zahran to its detriment. It appears from my review of the record that the insurance company had rejected Robin Zahran's estimates and conducted their own investigation into the actual losses suffered by him. Therefore, it would appear that the insurance company at no time relied on the statements of Robin Zahran and therefore, could not raise his misrepresentations as a defense to payment. I believe that he defendant attorneys failed to exercise the proper standard of care, skill and knowledge in their

representation of Robin Zahran by failing to raise this issue prior to trial or at trial.

Furthermore, at no time did the defendant attorneys timely offer jury instructions on the subject of reliance, nor did the defendant attorneys take any actions to attempt a dismissal of the countercomplaint filed by the insurance company based on reliance.

Finally, the defendant attorneys submitted no special interrogatories on the subject of reliance.

I believe with a reasonable degree of legal certainty, and am of the opinion that all of the afore stated omissions by the defendant attorneys constitute a breach of the care, skill and knowledge they owed Robin Zahran on the issue of reliance. The actions of the defendant attorneys in attempting to tender a tardy jury instruction/special interrogatory to the court for submission to the jury, well after the jury was charged and while they jury was deliberating, would indicate that the defendant attorneys recognized their error and attempted to remedy it, however that remedy came far too late to be of any assistance to the Zahrans.

Thirdly, I am of the opinion with a reasonable degree of legal certainty, that the defendant attorneys further breached their duty of care, skill and knowledge owed to Robin and Karen Zahran by failing to preserve the following issues for appeal: first, the innocent spouse issue was not properly preserved; secondly, an issue of estoppel under which the insurance company should have been estopped from asserting much of the arguments contained in their countercomplaint was never preserved for appeal; and, thirdly, the issue of reliance on the

alleged misrepresentations of Robin Zahran was never preserved for appeal.

There are numerous other issues which I believe constitute recognizable malpractice by the defendant attorneys as defined by their failure to use the care, skill and knowledge of similar attorneys in the fact situation of the underlying cause. They include:

a. The failure to file appropriate motions *in liminie* to prevent the insurance company in the underlying cause of action from introducing evidence to other losses suffered by Robin Zahran whereby he made claims against the insurance policy. From a review of the opening statement and closing argument, it would appear that the attorneys representing the insurance company argued through implication and otherwise that Robin Zahran was responsible for the fire previously occurring on one of the barns on the subject property. This situation obviously aggravated the jury and resulted in the verdict which was returned. Again, this issue also pertains to the conflict issue, as separate representation of Karen Zahran would have resulted in her isolation from this situation;

b. At no time did the defendant attorneys ever inquire of Robin Zahran or introduce proof as to how he arrived at the figures in his proof of loss. Further, the defendant attorneys at no time elicited from Robin Zahran, or through other evidence, introduced proof that Robin Zahran was in the state of Illinois when the insurance company in the underlying cause of action sent a contractor to his property to do the estimates. This would directly refute the allegations that Robin Zahran attempted to influence that contractor at the time of his estimates;

c. There appear to be numerous instances of conflicting testimony the expert retained by the insurance company to testify in the underlying cause of action, and there was no impeachment of those conflicts through the use of previously-given depositions.

I, therefore, am of the opinion with a reasonable degree of legal certainty, that the defendant attorneys failed to exercise a reasonable amount of care, skill and knowledge in their representation of Robin Zahran and Karen Zahran and breached their duty to the Zahrans by that failure, all as set forth above. Obviously, I would like to continue reviewing documents generated in the underlying cause of action and this opinion is subject to being supplemented upon that review.

Respectfully submitted,

Thomas W. Gooch III,
Attorney at Law
TWG:mlf

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Date: August 7, 1998
By the Court:
No. 97-3710

ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs-Appellants

v.

GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KEIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,
Defendants - Applies

Appeals from the United States District Court for the Eastern District of Wisconsin
No. 95 C 334, Charles N. Clevert, Judge

Upon consideration of the **STATUS REPORT** filed on August 7, 1998, by counsel for the appellants,

IT IS ORDERED that counsel file a further status report by 8/28/98.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 22, 1998

By the Court:

ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants,	))Appeal from the United)States District Court for
No. 97-1712 and 98-2123	)the Eastern District of
v	)Wisconsin
GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,	))) No. 95 C 334))))Charles N. Clevert) Judge))
Defendants-Appellees	)

The following are before the court:

1. **MOTION FOR AN EXTENSION OF TIME TO FILE THE BRIEF AND APPENDIX OF THE APPELLANTS,** filed on September 11, 1998, by counsel.

21 **MEMORANDUM IN OPPOSITION TO PALINTIFF-APPELLANTS' SEVENTH MOTION FOR AN EXTENSION OF TIME TO FILE THE BRIEF AND APPENDIX OF THE APPELLANTS DATED SEPTEBMER 11, 1998,** filed on September 21, 1998, by counsel.

IT IS ORDERED that briefing in these appeals will proceed as follows:

1. The brief and required short appendix of the appellants are due no later than October 23, 1998.

2. The brief of the appellees is due November 23, 1998.

3. The reply brief of the appellants, is any, is due December 7, 1998.

Appellants are advised that no further extensions of time will be allowed and that failure to file a brief by this due date will result in dismissal of the appeals for failure to prosecute.*

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* Note: The parties are advised that Rule 26(c), Federal Rules of Appellate Procedure, which allows for three additional days after service by mail, shall not apply when the due dates or briefs are specifically set by order of this court. All briefs are due by the dates ordered.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 6, 1998

By the Court:

ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants,	))Appeal from the United)States District Court for
No. 97-1712 and 98-2123	)the Eastern District of
v	)Wisconsin
GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,	))) No. 95 C 334))))Charles N. Clevert) Judge))
Defendants-Appellees	)

Briefing in these matters remains suspended pursuant to this court's order of September 17, 1998, in appeals no. 97-1712 and 98-1905.

The court, on its own motion, **VACATES** the briefing schedule set out in its order of September 22, 1998.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
December 22, 1998
Before
Hon. **William J. Bauer**, Circuit Judge
Hon. **Joel M. Flaum**, Circuit Judge
Hon. **Michael S. Kanne**, Circuit Judge

ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants,	)Appeal from the United
No. 97-1712	)States District Court for
v.	)the Eastern District
FRANKENMUTH MUTUAL INSURANCE COMPANY,	)of Wisconsin
Defendant-Appellee.	) No. 90 C 337
	)Thomas J. Curran,
	) Judge
ROBIN ZAHRAN and KAREN ZAHRAN	)
Plaintiffs-Appellants,	)Appeal from the United
	)States District Court
	)for The Eastern District
97-3710 & 98-2123	)of Wisconsin.
v.	)
GERALD G. SCHMIDT, JR., individually and the law firm of	)
SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC,	) No. 95 C 334
individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL,	)Charles N. Clevert,
individually and the law firm of BORGELT, POWELL, PETERSON	) Judge

& FRAUN, et al.,)
Defendants-Appellees)

ROBIN ZAHRAN and)
KAREN ZAHRAN,)Appeal from the United
Plaintiffs-Appellants,)States District Court for
)the Eastern District of
No. 97-3813 & 98-2122)Wisconsin.
v.)
)
CLEARY BUILDING)
CORPORATION,) No. 93 C 543
Wisconsin Corporation, and)
RALPH UECKER AND SONS,)
INCORPORATED,)Charles N. Clevert,
Defendants-Appellees) Judge

Upon consideration of the **EMERGENCY MOTION TO INTERVENE AND TO AMEND PLAINTIFFS-APPELLANTS' BRIEFS FILED ON AUG. 7, 1998, CEC. 4, 1998, DEC. 15, 1998 AND DEC. 16, 1998, REFERENCING THE ABOVE APPEALS. BASED ON APPELLANTS COUSEL INADEQUACY, LACK OF PREPARATION, FRAUD, AND MISREPRESENTIONS AND THE FILING OF INADEQUATE BRIEFS,** filed on December 18, 1998, by the pro se appellants,

IT IS ORDERED that the motion is **GRANTED.** Appellants are hereby **GRANTED** leave to file supplemental briefs in these matters, which briefs shall not exceed 7,000 words, pursuant to Fed. R. App. P. 32(a) (7) (B) (i).

Briefing is these matters shall proceed as follows:

1. Appellants' supplemental brief in No. 97-1712 shall be filed by January 4, 1999.

2. Appellants' supplemental brief in Nos. 97-3710 and 98-2123 shall be filed by January 11, 1999.

3. Appellants' supplemental brief in Nos. 97-3813 and 98-2122 shall be filed by January 19, 1999.

4. Appellees' in No. 97-1712 shall file their response brief by February 4, 1999.

5. Appellees' in Nos. 97-3710 and 98 2123 shall file their response brief by February 11, 1999.

6. Appellees' in Nos. 97-3813 and 98-2122 shall file their response brief by February 19, 1999.

7. Appellants' in No. 97-1712 shall file their reply brief, if any, by February 18, 1999.

8. Appellants' in Nos. 97-3710 and 98-2123 shall file their reply brief, if any, by February 25, 1999.

9. Appellants' in Nos. 97-3813 and 98-2122 shall file their reply brief, if any, by March 5, 1999.

Appellants are advised that their supplemental briefs must be received by the clerk of this court by the aforementioned due dates or they will not be filed in. The parties are advised that further motions for extensions of time will not be entertained.

Note: The parties are advised that rule 26(c), Federal Rules of Appellate Procedure, which allows for three additional days after service by mail, shall not apply when the due dates of briefs are specifically set by order of this court. All briefs are due by the dates ordered.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
December 29, 1998

By the Court:

ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants,	))Appeal from the United)States District Court for
No. 97-1712 v.	)the Eastern District)of Wisconsin
FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee.	)) No. 90 C 337)) Thomas J. Curran,) Judge
ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants,	))Appeal from the United)States District Court for)The Eastern District of
97-3710 & 98-2123 v.	)Wisconsin.
GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees	))) No. 95 C 334))Charles N. Clevert,) Judge

ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants,	)Appeal from the United)States District Court for)the Eastern District of
No. 97-3813 & 98-2122 v.	)Wisconsin.))
CLEARY BUILDING CORPORATION, Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED,	) No. 93 C 543))
Defendants-Appellees	)Charles N. Clevert,) Judge)

Upon consideration of **APPELLANTS EMERGENCY MOTION TO COMPEL THE TURN OVER OF APPELLANTS FILES THAT ARE IN THE POSSESSION OF ATTORNEY COHEN TO APPELLANTS**, filed on December 29, 1998, by counsel,

IT IS ORDERED that the motion is **DENIED.**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 6, 1999

By the Court:

ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants,	))Appeal from the United)States District Court for
No. 97-1712 v.	)the Eastern District)of Wisconsin
FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee.	)) No. 90 C 337)) Thomas J. Curran,) Judge
ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants,	))Appeal from the United)States District Court for)The Eastern District of
97-3710 & 98-2123 v.	)Wisconsin.)
GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees	)))) No. 95 C 334))Charles N. Clevert,) Judge))))))

ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 97-3813 & 98-2122 v.	)	
CLEARY BUILDING CORPORATION, Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED,	)	No. 93 C 543
	)	Charles N. Clevert, Judge
Defendants-Appellees	)	

The following is before the court:

1. **EMERGENCY MOTION FOR EXTENSION OF TIME BY 11 DAYS OR UNTIL JANUARY 22, 1999, IN APPEAL NO. 97-3710 & 98-2123,** filed on December 30, 1998, by counsel for appellants.

2. **EMERGENCY MOTION TO FILE AN EVERSIZED SUPPLEMENTAL BRIEF TO THE EXTENT OF 12,000 WORDS IN APPEAL NOS. 97-3710 & 98-2123 AND 97-3813 & 98-2122,** filed on December 30, 1998, by counsel for the appellants.

3. **PLAINTIFFS-APPELLANTS' MOTION TO FILE INSTANTER APPELLANTS SUPPLEMENTAL BRIEF,** filed on January 7, 1999, by counsel for appellants.

IT IS ORDERED that #1, #2, and #3 are **DENIED.**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 14, 1999

By the Court:

ROBIN ZHARAN and	)
KAREN ZAHRAN,	)Appeal from the United
Plaintiffs-Appellants,	)States District Court for
No. 97-1712 and 98-2123	)the Eastern District of
v	)Wisconsin
GERALD G. SCHMIDT, JR.	) No. 95 C 334
ROBERT C. BURRELL, COREGIS	)Charles N. Clevert,
INSURANCE COMPANY, et al.,	)Judge

Upon consideration of the **MOTION TO FILE INSTANTER APPELLANT'S UNTIMELY SUPPLEMENTAL BRIEF**, filed on January 12, 1999, by the pro-se appellant Robin Zahran,

IT IS ORDERED that the motion is **DENIED.**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 26, 1999

By the Court:

ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Eastern District of Wisconsin
No. 97-1712 and 98-2123 v	)	
GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees	)	No. 95 C 334
	)	Charles N. Clevert Judge

Upon consideration of the **MOTION TO RECONSIDER DENIAL OF APPELLANTS' MOTION TO FILE SUPPLEMENTAL BRIEF INSTANTER,** filed on January 16, 1999, by the pro se appellants,

IT IS ORDERED that the motion is **DENIED.**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Date: February 25, 1998
By the Court:
No. 97-3710 & 98-2123

ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs-Appellants

v.

GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KEIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,
Defendants - Appellees

Appeals from the United States District Court for the Eastern District of Wisconsin
No. 95 C 334, Charles N. Clevert, Judge

Upon consideration of the **MOTION FOR LEAVE TO FILE APPELLEES' BRIEF INSTANTER** filed on 2/24/99.

IT IS ORDERED that the motion is **GRANTED** and the clerk of this court is directed to file instanter the tendered copies of the brief of the appellees.

The reply brief of the appellants, if any, is due by 3/11/99.*

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* Note: The parties are advised that Rule 26(c), Federal

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
March 4, 1999

By the Court:

ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs-Appellants,	)	
	)Appeal from the United States District Court for the Eastern District of Wisconsin	
No. 97-1712 v.		
FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant-Appellee.	)	No. 90 C 337
	)	Thomas J. Curran, Judge

ROBIN ZAHRAN and KAREN ZAHRAN Plaintiffs-Appellants,	)	
	)Appeal from the United States District Court for The Eastern District of Wisconsin.	
97-3710 & 98-2123 v.		
GERALD G. SCHMIDT, JR., individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT	)	No. 95 C 334

Rules of Appellate Procedure, which allows for three additional days after the service by mail, shall not apply when the due dates of briefs are specifically set by order of this court. All briefs are due by the dates ordered.

C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees	)	Judge C. Clevert
ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, No. 97-3813 & 98-2122 v. CLEARY BUILDING CORPORATION, Wisconsin Corporation, and RALPH UECKER AND SONS, INCORPORATED, Defendants-Appellees	)	Appeal from the United States District Court for the Eastern District of Wisconsin.
	)	No. 93 C 543
	)	Charles N. Clevert, Judge

Upon consideration of the **PLAINTIFFS-APPELLANTS' MOTION TO MOVE THE COURT AND HONORABLE JUDGES BAUER, FLAUM, AND KANNE TO TRANSFER THE FOLLOWING APPELLANTS' APPEALS DISPOSITION TO ANOTHER CIRCUIT FOR RULING OR IN THE ALTERNATIVE FOR THE ABOVE NAMED NOS.** 97-1712, 97-3710, 98-2123, 97-3813 & 98-2122

JUDGES TO ABSTAIN FROM PARTICIPATING IN THE DETERMINATION OF THESE APPEALS DUE TO PRIOR DISCLOSURE, filed on March 1, 1999, by the prose appellants,

IT IS ORDERED that #1 is **DENIED.**

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
JUDGEMENT - WITHOUT ORAL ARGUMENT

Date: April 14, 1999
BEFORE: Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANE, Circuit Judge

Nos. 97-3710, 98-2123 & 99-1780

ROBIN ZAHARN and KAREN ZAHRAN
Plaintiffs-Appellants,
v.
GERALD G. SCHMIDT, JR., individually, and the law firm of SCHMIDT, DARLING & ERIN, MARJAN R. KMIEC, individually and the law from of KMEIC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,
Defendants - Appellees

Appeals from the United States District Court for the Eastern District of Wisconsin
No. 95 C 334, Charles N. Clevert, Judge

The decisions of the District Court are AFFIRMED, with costs, as to appeal Nos. 97-3710 and 98-2123. Robin and Karen Zahran are directed under Rule 38 to show cause within 14 days why they should not be sanctioned for filing a frivolous appeal. As to appeal No. 99-1780, the post-judgement decision of the District Court awarding costs and fees to the defendants is summarily AFFIRMED, with costs. The above is in accordance with the decision of this court on this date.

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Unpublished order not to be cited per Circuit Rule 53

Submitted March 10, 1999*
Decided April 14, 1999
Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANE, Circuit Judge

ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, No. 97-3710, 98-2123, 99-1780 v. GERALD G. SCHMIDT, JR., individually, and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees.	)Appeals from the United States District Court for the Eastern District of Wisconsin. No. 95 C 334 Charles N. Clevert, Judge

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary and the appeal is submitted on the briefs and record. *See* fed. R. App. P. 34(a)(2).

ORDER

Robin and Karen Zahran own a diary farm in Wisconsin. In 1989 and 1990, property at their farm was damaged, first by a tornado, and later by a series of fires. The Zahrans filed claims with their insurer, Frankenmuth Mutual Insurance Co. ("Frankenmuth"), but when Frankenmuth declined to pay in full, the Zahrans filed suit against the company alleging bad faith and breach of contract. The insurer countersued for fraud, concealment, and material misrepresentation, seeking to recover money already paid out on the claims. Following a jury trial and cross-appeals, this court entered an order affirming the verdict against the Zahrans on their breach of contract and bad faith claims, and remanded the case with instructions to enter judgement in favor of Frankenmuth on its counterclaim. *See Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994) ("*Zahran I*") (unpublished disposition), *cert. denied*, 513 U.S. 1083 (1995).*

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* The full history of this litigation has been set out elsewhere at some length and need not be recounted here. *See Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-1712, 97-3710, 98-2123 & 98-1905, 1998 WL 975094 (7th Cir. Nov. 4, 1998); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-1712 & 98-1905, 1998 WL 975072 (7th Cir. Sept. 17, 1998); *Zahran v. Frankenmuth Mut. Ins. Co.*, 95-2588 & 96-2270, 1997 WL 205381 (7th Cir. Apr. 22, 1997); *Zahran v. Frankenmuth Ins. Co.*, No. 93-2853, 1995 WL 241392 (7th Cir. Apr. 25, 1995), *cert denied*, 516 U.S. 945 (1995); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994), *cert. denied*, 513 U.S. 1083 (1995); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1997 WL 53107 (N.D. Ill. Feb. 06, 1997); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1996 WL 446891 (N.D. Ill. Aug.

Dissatisfied, the Zahrans then filed a malpractice action against the attorneys who had handled their suit against Frankenmuth. Following a bench trial, the court dismissed all claims against the defendants and entered judgement and costs against the Zahrans on a contract claim filed by their former trial attorney. Though the Zahrans raise a number of issues on appeal, only two warrant extended discussion. For the reasons set forth below, we affirm the decisions of the district court.

As a preliminary matter, jurisdiction in this case based on the diversity statute: defendant attorneys and firms of which they are members or partners are citizens of the state of Wisconsin, the Zahrans are citizens of Illinois, and the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332. During the course of litigation, the Zahrans filed a third amended complaint in which they named as additional defendants the attorneys' liability insurers, one of which is a citizen both of Indiana, where it is incorporated, and of Illinois, the state of its principal place of business. *See id.* § 1332(c)(1); *Krueger v. Cartwright*, 996 F.2d 928, 931 (7th Cir. 1993). (R.132.) Because jurisdiction is determined at the time the plaintiff's well-pleaded complaint is filed, *see Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426 (1991), and because the insurer was not an indispensable party at the time the action was commenced, *see Howell v. Tribune Entertainment Co.*, 106 F.3d 215, 217-18 (7th Cir. 1997); *Whalen v. Carter*, 954 F.2d 1087, 1095-96 (5th Cir. 1992), the Zahrans addition of a non-diverse defendant two years into the litigation did not destroy the basis of jurisdiction.

2, 1996); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1996 WL 182563 (N.D. Ill. Apr. 15, 1996); *Zahran v. Frankenmuth Mut. Ins. Co., No. 94 C 4827, 1995 WL 535088 (N.D. Ill. Sept. 5, 1995).*

Under Wisconsin law, which applies here, *see Kuehn v. Childrens Hosp.*, 119 F. 3d 1296, 1300-01 (7th Cir. 1997); *Hunker v. Royal Indem. Co.*, 204 N.W. 2d 897, 901-04 (Wis. 1973), a plaintiff attempting to establish legal malpractice must demonstrate in relevant part that former counsel's professional conduct fell below a standard of reasonable care. Expert testimony is required to establish that standard unless the alleged conduct or omissions do not involve legal expertise, thereby falling within the realm of ordinary experience, or are so gross as to be improper as a matter of law. *See Olfe v. Gordon*, 286 N.W. 2d 573, 576-77(Wis. 1980); *see also* Wis. Stat § 907.72 (West 1998); *Helmbrecht v. St. Paul Ins. Co.*, 362 N.W. 2d 118 9Sic. 1985); *Lewandowski v. Continental Cas. Co.*, 276 N.W.2d284 (Wisc. 1979). Whether counsel has breached the standard of care is a mixed question of law and fact, to be determined based on the particular circumstances of each case, though as a practical matter the challenged conduct usually cannot be found improper solely as a matter of law. *See Helmbrecht*, 362 N.W.2d at 128.

In this case, the Zahrans contend that former counsel breached the standard of skill, care, and knowledge of reasonably prudent Wisconsin attorneys by failing variously: to conduct pre-trial discovery on the subject of Frankenmuth's alleged racism and its participation in a conspiracy against the Zahrans; to submit certain motions *in limine* or to move for summary judgement on Frankenmuth's counterclaim; to argue non-reliance by Frankenmuth on the Zahrans' fraudulent proof of loss statements; to treat Robin and Karen Zahran as separate insureds in order to permit Karen to assert an "innocent insured" defense and to submit jury instructions on the issues of reliance and the innocent insured rule. Because none of these purported errors represents a matter within the realm of ordinary experience (thereby eliminating the need for legal expertise) or is so gross as to be improper as a matter of law,

the Zahrans were required to present expert testimony. Unfortunately for the Zahrans, the district judge, who correctly characterised their expert's testimony as the "linchpin" of their case, found their expert unworthy of belief. As a consequence, the court concluded not merely that the Zahrans had failed to present sufficient proof to sustain their claims, *see Cramer v. Theda Clark Mem'l Host.*, 172 N.W.2d 427,429 (Wis. 1969), but that the evidence adduced at trial positively refuted those claims, including their innocent insured and reliance arguments.

The district judge found that the testimony of the Zahrans' expert witness should be accorded little weight because the "expert" was not, nor had he ever been, admitted to practice either in the state of Wisconsin or in its federal district courts; had never testified as an expert witness in a legal malpractice action; had retained local counsel on those few occasions when he represented clients in Wisconsin; did not hold himself out as an expert on insurance policies; was unfamiliar with and, indeed, affirmatively misapplied, relevant Wisconsin law pertaining to insurance coverage and the appropriate standard of care; failed to show that either Robin or Karen Zahran had been prejudiced by any of former counsels' purported errors; and was testifying in large measure because of his close personal friendship with the attorney representing Karen Zahran in the malpractice action. The district court's findings in this regard are abundantly supported by the record, and we will not reverse its credibility determinations absent extraordinary circumstances. *See Etter v. J. Pease Constr. Co.*,963 F.2d 1005, 1011-12 (7th Cir. 1992). Similarly, because we cannot say either that the court misapplied the law or abused its discretion in limiting the scope of discovery or by excluding irrelevant testimony from other witnesses, we find no reason to disturb the malpractice judgement. *See, e.g., Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1052-53 (7th Cir. 1998); *In re Sheridan*,57 F.3d 627, 634-35 (7th Cir. 1995).

The Zahrans next contend that the district court erred in awarding a $20,000 judgement against them on a counterclaim brought by their trial attorney. *See* Fed. R. Civ. P. 13(a),(f); *Iglesias v. Mutual Life Ins. Co.*, 156 F.3d 237, 241-43 (1st Cir. 1998); *Valley Disposal Inc. v. Central Vt. Solid Waste Mgt. Distr.*, 113 F.3d 357,364-65 (2d Cir. 1997). During the course of the original storm damage trial, Frankenmuth offered the Zahrans $110,000 to settle the case. The Zahran's attorney urged his clients to accept the offer but his advice was rejected. Instead, Robin Zahran gave trial counsel a signed, hand-written note promising to pay $20,000, win or lose, to try the case to judgement and to cease further settlement discussion. Without citation to the record or to relevant authority, and without any elaboration, the Zahrans now suggest that their mid-trial modification of the terms of counsel's original contract is void for want of consideration. Their contentions are unavailing. It is settled in Wisconsin that a valid contract - here, trail representation based on a contingency fee plus costs secured by a non-refundable retainer - may be modified by consent of the parties without additional consideration. *See Everlite Mfg. Co. v. Grand Valley Mach. & Tool Co.*, 171 N.W.2d 188, 190 (Wis. 1969). The Zahrans' suggestion that Robin's signature did not bind Karen to the modification is also unsupported by the record, as the district court correctly concluded. *See Lakeshore Comm'l Fin. Corp. v. Drobac*, 319 N.W. 2d 839, 845-46 (Wis. 1982); *Smith v. Osborn*, 223 N.W. 2d 913, 919-21 (Wisc. 1974). Furthermore, to the extent that the Zahrans' two sentence contract avoidance "argument" can be construed as an attempt to invoke the pre-existing legal duty rule - a party who does only what he is already legally obligated to do has not suffered a legal detriment and thus the modification fails for want of consideration - they have waived their right to raise that issue by failing to articulate it and to support it with citations to relevant authority and the record. *See* Fed. R. App. P.

28(a)(7),(a)(9); *John v. Barron*, 897 F.2d 1387, 1393-94 (7th Cir. 1990); *see also First Wis. Nat'l Bank v. Oby, 188* N.W.2d 454 (Wis. 1971); *Allegheny College v. National Chautaqua Cty. Bk.*, 159 N.E. 173 (N.Y. 1927) (Cardoze, C.J.); John D. Calamari & Joseph M. Perilli, Contracts § 4-9-10 (2d ed. 1987).

Early in this matter appellees moved for sanctions, arguing that the Zahran's relentless pursuit of their claims was vexatious and undertaken in bad faith. *See* Fed. R. App. P. 38; *Brooks v. Allison Div. of General Motors*, 874 F.2d 489,490-91 (7th Cir. 1989). As we noted in *Zahran v. Frankenmuth Mut.* Ins. Co.., Nos. 97-1712 & 98-1905, 1998 WL 975072 (7th Cir. Sept. 17, 1998) (unpublished disposition), this circuit employs a two-part test to determine whether sanctions should be entered. First, the court must conclude that the appeal is frivolous, and second, that sanctions are appropriate. *See Depoister v. Mary M. Holloway Foundation*, 36 F.3d 582, 588 (7th Cir. 1994). An appeal is frivolous when "the result is foreordained by the lack of substance to the appellant's arguments." *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989)(en banc), or when the appeal "merely restates arguments that the district court properly rejected," *A-Abart Elec. Supply, Inc. v. Emerson Elec. Co.*, 956 F2d 1399, 1406-07 97th Cir. 1992) (internal quotation and citation omitted). The court requires some indication that the appeal was prosecuted for purposes of delay, harassment, or out of sheer obstinacy, with no reasonable exception of altering the district court's judgement. *See Flexible Mfg. Sys. Pty. Ltd v. Super Products Corp.*, 86 F.3d 96, 101 (7th Cir. 1996).

In *Zahran I* we expressed deep scepticism, based on the same facts that give no rise to this case, that the Zahrans could prevail on a cause of action predicated either on the innocent insured rule or by raising questions of Frankenmuth's alleged non-reliance on material misrepresentations. *See Zahran I*, 1994 WL 107909, at *5nn.2-3; *Tempelis v. Aetna Cas. &*

Surety Co.,473 N.W. 2d 549, 552-43 (Wis. 1991) (reliance), *aff'd and modified on other grounds*, 485 N.W. 2d 217 (Wis. 1992); *Hedtcke v. Sentry Ins. Co.*, 326 N.W. 2d 727, 737-40 (Wis. 1982) (innocent insured). Undeterred, the Zahrans proceeded to file a malpractice action based on these same tow theories of liability. The district court, however, found neither legal nor factual grounds to permit Karen Zahran to invoke the innocent insured rule, and likewise found no need for Frankenmuth to demonstrate reliance on the Zahrans' fraudulent proofs of loss. Not with standing these findings and our prior cautionary observations, the Zahrans have made no meaningful effort in this appeal to address or to distinguish *Tempelis* and *Hedtcke* from the circumstances of their own case; indeed, Tempelis goes unmentioned in the Zahrans' opening brief, and *Hedtcke* is noted in passing just once. Not only is such cursory or non-existence treatment insufficient to preserve their arguments for appellate review, *see John*, 897 F2d at 1393, the Zahrans' failure to address the dispositive legal issues in their case brings this matter within reach of our broad observation in *Newlin v. Helman* that plaintiffs who have been told that their claims are foreclosed and who then appeal without offering any argument to undermine the district court's conclusions are acting in bad faith. 123 F.3d 429, 433 (7th Cir. 1997).

Accordingly, Robin and Karen Zahran are directed under Rule 38 to show cause within 14 days why they should not be sanctioned for filing a frivolous appeal. In all other respects, the decisions of the district court underlying appeals No. 97-3710 and No. 98-2123 are **AFFIRMED.**

We further note that on April 5, 1999, appeal No. 99-1780 was docketed by the Zahrans in this court: they contest the post-judgement award of costs incurred by defendants for printing and photocopies, and for non-party witness and court reporters' deposition transcript fees. *See* 28 U.S.C. § 1920; Fed. R. Civ. P. 54(d)(1). Based on principles of judicial

economy we will **CONSOLIDATE** for disposition appeal No. 99-1780 with appeals No. 97-3710 and No. 98-2123.

The costs awarded to the defendants by the district court were for properly-covered, fully-documented items that were reasonable and necessary to the litigation. *See, e.g., Haroco, Inc. v. American Nat'l Bk & Trust Co.*, 38 F.3d 1429, (7th Cir. 1994); *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633, 642-44 (7th Cir. 1994). After reviewing the district judge's through and well-founded order, we have determined that the district court abused its discretion or misapplied relevant law; and that the costs awarded were neither excessive nor unreasonable. The court has therefore determined that the filing of briefs would not be helpful to its consideration of the issues. *See Mather v. Village of Mundelein*, 869, F.2d 356, 357 (7th Cir. 1989)(per curiam).

Accordingly, it is ordered that the post-judgement decision of the district court awarding costs and fees to the defendants is summarily **AFFIRMED.** See Taylor v. City of New Albany, 979 F.2d 87 (7th Cir. 1992), *cert. denied*, 506 U.S. 1085 (1993).

United States Court of Appeals
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Gina J. Angello
Clerk
312-435-5850

Re: 97-3710, 98-2123

Dear Sir or Madam,

I am returning these documents to you unfiled.

The mandate of this court issued on 5/6/99 which returned the case to the District Court and closed the appeal in this court.

The only filing we could accept in this appeal at this time would be a motion to recall the mandate.

This court no longer has jurisdiction over this case.

Sincerely,

Pro Se Clerk

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 17, 1999

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANE, Circuit Judge

ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants,	)Appeals from the United)States District Court for)the Eastern District of
No. 97-3710, 98-2123	)Wisconsin.
v.	)
GERALD G. SCHMIDT, JR., individually, and the law firm of	) No. 95 C 334)
SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees.	)Charles N. Clevert,) Judge))))))

ORDER

Upon consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on April 18, 1999, by petitioners-appellants *pro se*, no judge in active service has requested a vote on the rehearing *en banc*, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing *en banc* be **DENIED.**

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 19, 1999
Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANE, Circuit Judge

ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, No. 97-3710, 98-2123 v. GERALD G. SCHMIDT, JR., individually, and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees.	)Appeals from the United)States District Court for)the Eastern District of)Wisconsin.)) No. 95 C 334))Charles N. Clevert,) Judge))))))

ORDER

For almost a decade, Robin and Karen Zahran have been embroiled in litigation, mostly self-initiated, stemming from storm and fire damage at their Wisconsin dairy farm in 1989 and 1990. The Zahrans, who are Illinois citizens, brought multiple federal lawsuits* under the diversity statute, 28 U.S.C. § 1332,

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* For a full account of the Zahrans' litigation, see *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-3710, 98-2123 & 99-

and in April 1999 we affirmed the judgements underlying these consolidated appeals and directed the Zahrans to show cause why they should not be sanctioned under Federal Rule of Appellate Procedure 38 for pursuing a frivolous appeal. *See Zahran v. Schmidt*, Nos. 97-3710, 98-2123 & 99-1780, 1999 WL 220112 (7th Cir. Apr. 14, 1999) *("Zahran VI")*. For the reasons that follow, and subject to certain limitations, see *Support Sys. Int'l v. Mack*, 45 F.3d 185 (7th Cir. 1995), we now bar Robin and Karen Zahran from further litigation in the federal courts of this circuit.

In 1990, the Zahrans first sued Frankenmuth Mutual Insurance Company after the insurer refused to pay the full amount of the Zahrans' casualty claims, and Frankenmuth countersued to recover the partial payments it already had made. following a trail and cross-appeals, we affirmed the

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1780, 1999 WL 220112 (7th Cir. Apr. 14, 1999); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-1712, 97-3710, 98-2123 & 98-1905 WL 975094(7th Cir. Nov. 4, 1998); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 97-1712 & 98-1905, 1998 WL 975072 (7th Cir. Sept. 17, 1998); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 95-2588 & 96-2270, 1997 WL 205381 (7th Cir. Apr. 22, 1997); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 93-2853, 1995 WL 241392 (7th Cir. Apr. 25, 1995); *Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994). See also *Zahran v. Frankenmuth Mt. Ins. Co.*, No. 94 C 4827, 1997 WL 53107 (N.D. Ill. Feb. 6, 1997); *Zahran v. Frankenmuth Mut. Ins. Co.*, No.94 C 4827, 1996 WL 446891 (N.D. Ill. Aug. 2, 1996); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1996 WL 182563 (N.D. Ill. Apr. 15, 1996); *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 94 C 4827, 1995 WL 535088 (N.D. Ill. Sept. 5, 1995).

jury's verdict against the Zahrans on their claims, reversed the dismissal of Frankenmuth's counterclaim, and remanded with instructions to enter judgement in favor of the company on its counterclaim . *See Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994) *("Zahran I")*. Robin and Karen Zahran then proceeded, over the course of the next five years, to bring additional suits against what appears to have been anyone connected with their original loss claims. In their complaints, the Zahrans alleged a plethora of harms, including breach of contract, breach of the duties of fair dealing and good faith, breach of fiduciary duty, bad faith, fraud, conspiracy to defraud, racketeering, slander, libel, interference with contractual relations, violations of the Fair Credit Reporting Act, 15 U. S. C. § 1681 *et seq.*, loss of credit rating, racism, assorted common law torts and malpractice. The district courts, and this court on review, determined these claims either to be unsupported by evidence or case law, flatly meritless, or barred on principles of preclusion, the *Rooker-Feldman* doctrine, or waiver. *See Zahran VI*, 1999 WL 220112 at *2-3; *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 97-1712, 1999 WL 191493 (7th Cir. Mar. 25, 1999) *("Zahran IV"); Zahran v. Frankenmuth Mut. Ins. Co.*, No. 97 C 978 (N.D. Ill. Mar. 11, 1998), *aff'd* No.98-1905, 1998 WL 975072 (7th Cir. Sept. 17, 1998) *("Zahran V")*.

The appeals giving rise to our present order are illustrative of the Zahrans' approach to litigation in this circuit. In *Zahran I*, we twice observed that arguments the Zahrans had forfeited by not raising them at trail appeared in any event to be unsupportable based on the facts of the case. 1994 WL 107909, at*2nn.2-3. Karen Zahran separately appealed the denial of a post-judgment motion in the case underlying *Zahran I, see* Fed. R. Civ. P. 60(b), but rather than identify perceived abuses of discretion or errors by the district court, she merely attempted to re-litigate the merits of the underlying lawsuit. We affirmed

the district court's decision. *See Zahran v. Frankenmuth Mut. Ins. Co.*, Nos. 95-2588 & 96-2270, 1997 WL 205381 (7th Cir. Apr. 22, 1997) *("Zahran III(a) & II(b)")*. Undeterred, Robin and Karen Zahran next sued their former attorneys for malpractice based on the same acts, omissions and theories of liability asserted in their first appeal. They lost at trial, in part because of the infirmities we previously identified. Still the Zahrans appealed, and when they did they failed entirely to address the dispositive legal issues in the matter - notwithstanding our prior observations in *Zahran I*- and once again simply attempted to re-litigate their case on appeal. *See Zahran VI*, 1999 WL 220112, at *4.

The decision to appeal, like the decision to initiate a lawsuit in district court, should be a considered one rather than a "knee-jerk reaction" to every adverse decision or event. *See Simon & Flynn, Inc.. v. Time Inc.*, 513 F.2d 832, 834 (2d Cir. 1975) (cited in *Maneikis v. Jordan*, 678 F.2d 720, 722 (7th Cir. 1985). Frivolous appeals divert scarce judicial resources from meritorious cases filed by litigants who are willing to abide by the court's rules and decisions, and part of our responsibility is to allocate our resources in a way that promotes justice and ensures that the courthouse doors remain open to all. *See In re McDonald*, 489 U.S. 180, 184 (1989); *United States ex rel. Verdone v. Circuit Court for Taylor County*, 73 F.3d 669, 671 (7th Cir. 1995). Time and again the Zahrans have been told their claims are frivolous, yet they proceeded undeterred, often after having been subjected to substantial sanctions in the district courts. In our initial order in *Zahran IV*, we observed that the Zahrans have refused to accept the adverse judgements handed them by the various courts of this circuit. *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 97-1712, 1998 WL 975072, at *7 (7th Cir. Sept. 17, 1998). Their consistent response has been simply to file another suit in a different district court, despite repeated determinations that their causes of action are

meritless or otherwise barred fro re-litigation. In this regard, we note that the Zahrans tendered insufficient funds checks totaling almost $12,000 to satisfy sanctions imposed by the district courts, and when told the checks are worthless they did nothing until we directed them to respond to a motion to hold them in contempt.

It is time for this endless litigation to stop. The Zahrans' vexatious filings already have prompted us to curtail to a degree their ability to initiate new lawsuits arising from these events of nearly a decade ago. *See Zahran IV, & V,* 1998 WL 975072, at*7-8. But enjoining their pursuit of new lawsuits has not dissuaded the Zahrans from continuing to advance frivolous arguments in the old ones. We thus conclude that a broader restriction on the Zahrans' power to enmesh the federal courts in their campaign of harassment is both necessary and appropriate. At present, the Zahrans only active case in this circuit court is appeal no. 99-1618, which arises from a post-judgment award of costs in cause No. 93 C 543, the action underlying *Zahran v. Cleary Bldg. Corp.*, Nos. 97-3813 & 98-2122, 1999 WL 439402 (7th Cir. June 21, 1999). That appeal will continue to its conclusion, but that will be all.

IT IS ORDERED that, with the exception of papers on briefs tendered in this court in connection with appeal no. 99-1618, the clerks of the federal courts in this circuit shall return unfiled any documents tendered by or on behalf of Robin or Karen Zahran, either individually, jointly, with others, or through a representative.* Should Robin or Karen Zahran continue to file new actions or otherwise act in violation of this order, the federal courts of this circuit, including this court,

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* An exceptions made for criminal cases and petitions for writ of habeas corpus. *See Support Sys. Int'l, Inc. v. Mack,* 45 F.3d 185, 186 (7th Cir. 1995).

reserve the right to initiate contempt proceedings against the. *See, e.g., Verdone,* 73 F.3d at 674-75; *Mack,* 45 F.3d at 186-87. The numerous injunctions entered by the district courts of this circuit remain in place, as will the injunction entered in our order of September 17, 1998, *see Zahran IV & V,* 1998 WL 97502, at *7-8, but their significance is limited in light of this order.

IT IS FURTHER ORDERED that the Zahrans are granted leave to petition this court, no earlier than two years from today's date, for modification or rescission of this order. The petition must either (a) be prepared and filed by a licensed attorney, or (b) if filed by the Zahrans *pro-se,* be accompanied by a supporting memorandum of law. Any petition shall include a detailed affidavit certifying that the claims sought to be presented are not frivolous and have never before been raised in a prior suit. The affidavit should also set forth facts showing that the pattern of vexatious litigation in which the Zahrans have engaged to date will reoccur if the petition is granted.

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 7, 1999
Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANE, Circuit Judge

ROBIN ZAHRAN and KAREN ZAHRAN, Plaintiffs-Appellants, No. 97-3710, 98-2123 v. GERALD G. SCHMIDT, JR., individually, and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al., Defendants-Appellees.	)Appeals from the United)States District Court for)the Eastern District of)Wisconsin.)) No. 95 C 334))Charles N. Clevert,) Judge)))))

Upon consideration of the **MOTION FOR CLARIFICATION OF ORDER OF THIS COURT DATED 8/19/99 DIRECTING THAT EITHER OF ZAHRANS JOINTLY, INDIVIDUALLY, WITH OTHERS, OR THROUGH A REPRESENTATIVE BE BARRED FROM FILING ANY PAPERS IN THE FEDERAL COURTS OF THIS CIRCUIT,** filed on August 21, 1999 by pro-se appellant Robin Zahran.

IT IS ORDERED that this court's order of August 19, 1999 is **AMENDED** to read as follows:

For almost a decade, Robin and Karen Zahran have been embroiled in litigation, mostly self-iniated, stemming from storm and fire damage at their Wisconsin dairy farm in 1989 and 1990. The Zahrans, who are Illinois citizens, brought multiple federal lawsuits* under the diversity statute, 28 U.S.C. § 1332, and in April 1999 we affirmed the judgements underlying these consolidated appeals and directed the Zahrans to show cause why they should not be sanctioned under Federal Rule of Appellate Procedure 38 for pursuing a frivolous appeal. *See Zahran v. Schmidt,* Nos. 97-3710, 98-2123 & 99-1780, 1999

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WL 220112 (7th Cir. Apr. 14, 1999) *("Zahran VI")*. For the reasons that follow, and subject to certain limitations, *see Support Sys. Int'l v. Mack*, 45 F.3d 185 (7th Cir. 1995), we now bar Robin and Karen Zahran from further litigation in the federal courts of this circuit.

In 1990, the Zahrans first sued Frankenmuth Mutual Insurance Company after the insurer refused to pay the full amount of the Zahrans' casualty claims, and Frankenmuth countersued to recover the partial payments it already had made. following a trail and cross-appeals, we affirmed the jury's verdict against the Zahrans on their claims, reversed the dismissal of Frankenmuth's counterclaim, and remanded with instructions to enter judgement in favor of the company on its counterclaim . *See Zahran v. Frankenmuth Mut. Ins. Co.,* Nos. 92-1778 & 92-1848, 1994 WL 107909 (7th Cir. Mar. 28, 1994) *("Zahran I")*. Robin and Karen Zahran then proceeded, over the course of the next five years, to bring additional suits against what appears to have been anyone connected with their original loss claims. In their complaints, the Zahrans alleged a plethora of harms, including breach of contract, breach of the duties of fair dealing and good faith, breach of fiduciary duty, bad faith, fraud, conspiracy to defraud, racketeering, slander, libel, interference with contractual relations, violations of the Fair Credit Reporting Act, 15 U. S. C. § 1681 *et seq*., loss of credit rating, racism, assorted common law torts and malpractice. The district courts, and this court on review, determined these claims either to be unsupported by evidence or case law, flatly meritless, or barred on principles of preclusion, the *Rooker-Feldman* doctrine, or waiver. *See Zahran VI*, 1999 WL 220112 at *2-3; *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 97-1712, 1999 WL 191493 (7th Cir. Mar. 25, 1999) *("Zahran IV"); Zahran v. Frankenmuth Mut. Ins. Co.,* No. 97 C 978 (N.D. Ill. Mar. 11, 1998), *aff'd* No.98-1905, 1998 WL 975072 (7th Cir. Sept. 17, 1998) *("Zahran V")*.

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The decision to appeal, like the decision to initiate a lawsuit in district court, should be a considered one rather than a "knee-jerk reaction" to every adverse decision or event. *See Simon & Flynn, Inc.. v. Time Inc.,* 513 F.2d 832, 834 (2d Cir. 1975) (cited in *Maneikis v. Jordan,* 678 F.2d 720, 722 (7th Cir. 1985). Frivolous appeals divert scarce judicial resources from meritorious cases filed by litigants who are willing to abide by the court's rules and decisions, and part of our responsibility is to allocate our resources in a way that promotes justice and ensures that the courthouse doors remain open to all. *See In re McDonald,* 489 U.S. 180, 184 (1989); *United States ex rel. Verdone v. Circuit Court for Taylor County,* 73 F.3d 669, 671

(7th Cir. 1995). Time and again the Zahrans have been told their claims are frivolous, yet they proceeded undeterred, often after having been subjected to substantial sanctions in the district courts. In our initial order in *Zahran IV*, we observed that the Zahrans have refused to accept the adverse judgements handed them by the various courts of this circuit. *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 97-1712, 1998 WL 975072, at *7 (7th Cir. Sept. 17, 1998). Their consistent response has been simply to file another suit in a different district court, despite repeated determinations that their causes of action are meritless or otherwise barred fro re-litigation. In this regard, we note that the Zahrans tendered insufficient funds checks totaling almost $12,000 to satisfy sanctions imposed by the district courts, and when told the checks are worthless they did nothing until we directed them to respond to a motion to hold them in contempt.

It is time for this endless litigation to stop. The Zahrans' vexatious filings already have prompted us to curtail to a degree their ability to initiate new lawsuits arising from these events of nearly a decade ago. *See Zahran IV, & V*, 1998 WL 975072, at*7-8. But enjoining their pursuit of new lawsuits has not dissuaded the Zahrans from continuing to advance frivolous arguments in the old ones. We thus conclude that a broader restriction on the Zahrans' power to enmesh the federal courts in their campaign of harassment is both necessary and appropriate. At present, the Zahrans have two active cases in this circuit. The first, appeal no. 99-1618 pending in this court, arises from a post-judgment award of costs in cause No. 93 C 543, the action underlying *Zahran v. Cleary Bldg. Corp.*, Nos. 97-3813 & 98-2122, 1999 WL 439402 (7th Cir. June 21, 1999). The second, *Zahran, et al v. National Guardian Life Ins. Co.*, No. 90-CV-907 (N.D. Ill. filed Feb. 16, 1990), resulted in the August 20, 1999 entry of a monetary judgement against Robin Zahran and his wholly-owned corporation, Oak

Brook Associates Financial Services, Inc. We will permit Robin and Karen Zahran to litigate appeal no. 99-1618 to its conclusion. We will also allow Robin Zahran and his corporation to litigate the *National Guardian* case to its conclusion, including through appeal should there be one. And that will be all.

IT IS ORDERED that, except as stated above with respect to appeal no. 99-1618 in this court and Cause No. 90-CV-907 in the United States District Court for the Northern District of Illinois, the clerks of the federal courts in this circuit shall return unfiled any documents tendered by or on behalf of Robin or Karen Zahran, either individually, jointly, with others, or through a representative.* Should Robin or Karen Zahran continue to file new actions or otherwise act in violation of this order, the federal courts of this circuit, including this court, reserve the right to initiate contempt proceedings against the. *See, e.g., Verdone*, 73 F.3d at 674-75; *Mack*, 45 F.3d at 186-87. The numerous injunctions entered by the district courts of this circuit remain in place, as will the injunction entered in our order of September 17, 1998, *see Zahran IV & V*, 1998 WL 97502, at *7-8, but their significance is limited in light of this order.

IT IS FURTHER ORDERED that the Zahrans are granted leave to petition this court, no earlier than two years from today's date, for modification or rescission of this order. The petition must either (a) be prepared and filed by a licensed attorney, or (b) if filed by the Zahrans *pro-se*, be accompanied by a supporting memorandum of law. Any petition shall include

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* An exceptions made for criminal cases and petitions for writ of habeas corpus. *See Support Sys. Int'l, Inc. v. Mack*, 45 F.3d 185, 186 (7th Cir. 1995).

a detailed affidavit certifying that the claims sought to be presented are not frivolous and have never before been raised in a prior suit. The affidavit should also set forth facts showing that the pattern of vexatious litigation in which the Zahrans have engaged to date will reoccur if the petition is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ROBIN ZHARAN and KAREN ZAHRAN, Plaintiffs	))CASE NO.) 95 C 334
v	)
GERALD G. SCHMIDT, JR., Individually, and the law firm of SCHMIDT, DARLING ERWIN, and COREGIS INSURANCE CO., and	)
ROBERT C. BURRELL, Individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, and RELIANCE INSURANCE COMPANY, and	)
MARJAN R. KMEIC, Individually, and the Law Firm of KMEIC LAW OFFICE and WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY, Defendants	)

HONORABLE CHARLES N. CLEVERT

PRESIDING DISTRICT COURT JUDGE

MILWAUKEE, WISCONSIN SEPTEMBER 23, 1997
COURT'S DECISION

HELD IN THE ABOVE ENTITLED COURT TRIAL

APPEARANCES:

JOHN H. BICKLEY, JR., John H. Bickley & Associates, 230 N. Michigan Ave., Chicago, IL 60601 appearing for Karen Zahran

KENNETH R. NOWAKOWSKI, Whyte, Hirschboeck & Dudek, 111 E. Wisconsin Ave., Milwaukee, WI 53202, appearing for Gerald Schmidt, Schmidt, Darling & Irwin and Coregis Insurance Company.

TERRY E. JOHNSON, Peterson, Johnson & Murray, 733 N. Van Buren St., Milwaukee, WI 53202, appearing for Robert Burrell and Borgelt, Powell, Peterson & Frauen and Reliance Insurance Company,

CRAIG NELSON and CHRISTINE K. NELSON, Nelson, Dries & Zimmerman, 150 N. Sunnyslope Rd., Brookfield, WI 53005, appearing for Marjan Kmiec and Kmiec Law Office and Wisconsin Lawyers Mutual Insurance Company.

CYNTHIA M. BOHMAN
Official United States Court Reporter
517 E. Wisconsin Avenue, Room 226
Milwaukee, WI 53202

PROCEEDINGS

(Afternoon proceedings commenced at 2:01 p.m.)

THE CLERK: Case number 95 C 334, Robin Zahran and Karen Zahran, plaintiffs, v. Gerald G. Schmidt, et al. May we have the appearances, please.

MR. BICKLEY: If the court please, John H. Bickley, Jr. representing Mrs. Zahran. Mr. Zahran is unable to be present this morning as I believe he's communicated to the Court. He's suffering from a brain aneurysm and he's in the

hospital right now having an, I think it's an angiogram to determine whether it's operable or not. Excuse his presence.

MS. NELSON: Christine K. Nelson and Craig Nelson, law firm of Nelson, Dries & Zimmerman, S.C. on behalf of Marjan R. Kmiec, Kmiec Law Offices and Wisconsin Layers. Mutual Insurance Company. Mr. Kmiec is also in court.

MR. JOHNSON: For the defendants Robert Burrell, Borgelt, Powell, Peterson & Frauen and Reliance Insurance Company, Terry Johnson.

MR. NOWAKOWSKI: For the Schmidt defendants, Kenneth R. Nowakowski, Whyte, Hirschboeck, Dudek.

THE COURT: Good afternoon, everyone. I do want to issue a decision in connection with this matter today. It was a rather protracted trail in this case and it was quite unfortunate that we were not able to resolve this matter immediately upon the close of testimony. However, the Court did delay in large measure because, as you know, Mr. Zahran became ill immediately after he concluded his testimony in this case. As you know, this case is one which is in large measure about credibility. It is one where the plaintiffs, Karen Zahran and Robin Zahran, are alleging legal malpractice by the individual defendants and are seeking to recover from them and their insurance carriers.

In order to establish legal malpractice a plaintiff must show that there is an attorney-client relationship, acts of negligence by the attorney, injury to the client. There must be proximate cause for the injury resulting from the attorney's negligence, i.e., the client would have been successful in the matter for which the attorney was engaged but for the negligence. Also, the client's loss is restricted generally to the amount that was recovered except for the attorney's negligence. In order to establish its claim a plaintiff must produce testimony of an expert and present testimony that the alleged negligence

made a difference in the outcome of the matter handled by the defendant attorneys.

Let me go to the end and then go back and recap. The Court finds for the defense with regard to all matters in this case and against the plaintiffs. The Court has concluded that the plaintiffs in this case cannot and did not sustain their burden of proof and that there was a failure to proof with respect to their claim. The court also finds that with respect to Mr. Kmiec the defendants are liable to Mr. Kmiec for costs which were incurred on their behalf and with regard to their agreement to pay him $20,000 pursuant to a modified contract with Mr. Kmiec.

Now, to go back and touch on some points that are very significant and from a basis for the Court's conclusion. As I said, this is a case which is essentially about credibility. At all times relevant Robin Zahran and Karen Zahran were married and owned a dairy farm in Denmark, Wisconsin. The Zahrans are Illinois residents and reside at 718 Acorn Hill Road, Oakbrook, Illinois.

Marjan Kmiec is a licensed Wisconsin attorney whose office is located at 3741 West National Avenue, Milwaukee. Wisconsin Lawyers Mutual Liability Insurance Company is the professional liability carrier providing coverage pursuant to the terms, conditions, limits of liability and exclusions of said policy for Kmiec for the claim which forms the subject matter of this litigation. Robert C. Burrell is a licensed Wisconsin attorney and a shareholder in the law firm o Borgelt, Powell, Peterson & Frauen, S.C. This firm is insured by Reliance Insurance Company for professional liability for the claim asserted in this case. Gerald G. Schmidt, Jr. is a Wisconsin attorney, a licensed Wisconsin attorney. He practices law with Schmidt, Darling & Irwin. Coregis Insurance Company is the professional liability carrier for his firm.

On or about July 19, 1988 Frankenmuth Mutual Insurance Company issued a farm policy number FR0423155 to Robin and Karen Zahran providing insurance coverage for among other things their dairy farm located at 18422 Rosecrans Road, Denmark, Wisconsin. On May 24, 1989 a tornado struck the Zahrans' farm causing damage to various farm buildings, structures and personal property. Robin and Karen Zahran submitted to Frankenmuth two sworn proofs of loss and a letter as follows; (A) proof of loss dated July 25th, 1989 making claim in the amount of $240,300.37 less their deductible, (B) a proof of loss dated September 8, 1989 making claim in the amount of $180,564.67, and a letter dated September 22nd, 1989 claiming tornado damages in the amount of $314,492. The two sworn proofs of loss were signed by Robin and Karen Zahran. The third document was signed by Robert Burrell but was submitted on behalf of Robin and Karen Zahran.

Between approximately July 1 of 1989 and December 1 of 1989 Frankenmuth Insurance Company paid Robin and Karen Zahran a total of $182,888.37 on their tornado loss claim. Robin and Karen Zahran were not satisfied with that payment. In January of 1990 Robin and Karen Zahran employed the Illinois law firm of Fitzsimmons, Roberts, Bowen & Paine to commence an action against Frankenmuth Insurance and the United States District Court for the Northern District of Illinois alleging bad faith, breach of contract and violations of various statutes as a result of Frankenmuth's adjustment of their tornado claim. this suit was transferred to the United States District Court for the Eastern District of Wisconsin.

On July 23rd of 1990 Frankenmuth answered the complaint and asserted affirmative defenses and a counterclaim alleging that Robin and Karen Zahran misrepresented or concealed material facts in their proofs of loss. Frankenmuth's counterclaim sought repayment of the $182,888.37 previously paid on the tornado claim due to the alleged misrepresentation

and their proofs of loss. Attorney Melville Bowen, Jr. of the Fitzsimmons, Roberts, Bowen & Paine firm answered the Frankenmuth counterclaim in May of 1990 on behalf of both Robin and Karen Zahran.

In March of 1990 and on July 8th of that year while the Zahran's farm property remained insured with Frankenmuth two fires damaged the property once again. I should say the property was damaged once again by and in this case by two fires. The July 8, 1990 fire caused considerable damage including destruction of barn 151. By a proof of loss dated on or about August 28th of 1990 Robin Zahran and Karen Zahran asserted a claim against Frankenmuth for the July 8 fire for an approximate sum of $116,800. On or about November 1 of that year Frankenmuth made payment to Robin Zahran and Karen Zahran for the July 8 fire loss in the amount of $99,995. Of that sum the policy limits of $75,000 were paid for the fire loss to barn 151.

The Zahrans commenced separate litigation against Frankenmuth for the damages sustained in the fire loss on or about March 18 of 1991. The claim was made for both compensatory damages as well as consequential and punitive damages for alleged breach of good faith. The fire litigation was commenced on behalf of the plaintiffs by Attorney Joan Slezak, S-l-e-z-a-k. This case was ultimately transferred to the United States District Court for the Eastern District of Wisconsin. Thereafter an amended complaint was filed on behalf of the plaintiffs by Slezak. In March of 1992 Slezak withdrew her representation of Robin and Karen Zahran and they pursued the fire litigation pro se ultimately participating in trials.

On July 11, 1990 Robin and Karen Zahran retained Attorney Gerald Schmidt of Schmidt, Darling & Irwin to represent their interests in connection with the still pending lawsuit against Frankenmuth arising out of the tornado loss.

Judge Thomas J. Curran ordered Schmidt, Darling & Irwin and Gerald G. Schmidt substituted as counsel for the plaintiffs in place of Fitzsimmons, Roberts, Bowen & Paine. That he did on about July 23rd. Schmidt subsequently recommended that Robin and Karen retain Attorney Robert Burrell of Borgelt, Powell, Peterson & Frauen to represent their interests in that case. On or about October 11th of 1990 a formal substitution of attorneys was executed substituting the firm of Borgelt, Powell, Peterson & Frauen, S.C. in place of Schmidt, Darling & Irwin. Substitution was formally ordered on October 22nd,, 1990.

The scope of the Zahrans' retainer with Attorney Burrell was defined by a retainer contract dated September 1990 which included the prosecution of settlement of all claims for damages against Frankenmuth Insurance Company or others who shall be liable on account of the tornado wind damage of May 25th 1989 and the fire of July 8, 1990. On November 22nd , 1990 Burrell received Frankenmuth's drafts totalling the $99,995 previously mentioned with respect to the July 8, 1990 fire loss. Consistent with the retained agreement Borgelt, Powell, Peterson & Frauen received 50 percent of $20,000 of Frankenmuth's fire loss payment as attorneys fees.

On January 6, 1990 Frankenmuth filed a motion for leave to file its first amended answer including affirmative defenses and a counterclaim in the tornado litigation. Frankenmuth's proposed amended answer, affirmative defenses and counterclaim was identical to the original answer, affirmative defenses and counterclaim filed April 1990 with the exception of an additional affirmative defense alleging that Frankenmuth was entitled to an offset in the tornado litigation for payments made for the July 8 fire damage to barn 151 on the dairy farm. Mr. Burrell did not oppose this motion. The Court granted Frankenmuth's motion to amend in January of 1991.

The Court further notes that there was no basis for Attorney Burrell to oppose the motion to amend.

Burrell filed a reply to the counterclaim on or about February 1, 1991. In early 1991 Burrell advised Robin Zahran that Frankenmuth had offered $25,000 to settle the pending tornado litigation including but not limited to Robin and Karen Zahran's bad faith claims. He also recommended that Robin and Karen Zahran accept Frankenmuth's settlement offer. Robin and Karen Zahran refused Frankenmuth's $25,000 offer. During his representation of Robin and Karen Zahran Attorney Burrell prepared them for their examinations under oath, attended those examinations, reviewed documents, conducted discovery, negotiated with Frankenmuth's counsel and otherwise engaged in reasonable efforts to resolve the Zahran's tornado and fire claims.

Because he did not want to pursue the Zahrans' bad faith claim in early 1991 Attorney Burrell recommended that Robin and Karen Zahran retain Attorney Marjan Kmiec of the Kmiec Law Offices. Thereafter Robin and Karen Zahran met with Attorney Kmiec and eventually agreed to retain him. A retained agreement dated march 18, 1991 was subsequently entered and by virtue of that the Kmiec Law Offices and Attorney Marjan Kmiec in particular assumed responsibility for representing Robin and Karen Zahran. However, the formal order allowing Borgelt, Powell to withdraw and for Mr. Kmiec to appear in the litigation was not signed by Judge Curran until April 25th, 1991.

The retainer agreement between Robin and Karen Zahran and Attorney Kmiec provided for a contingency fee in addition to the requirement that the plaintiffs reimburse counsel for any costs incurred plus a $3,000 nonrefundable sum or retainer. The Kmiec Law Offices scope of retainer was limited to the trial of the tornado case. Trial began in the tornado case on or about December 16, 1991.

At or near the beginning of the trial the Zahrans jointly received an offer of $110,000 from Frankenmuth together with a request that, I should say, rather together with an agreement that Frankenmuth's counterclaim would be withdrawn. Attorney Kmiec and Attorney Christopher McConville made good faith recommendations to Robin and Karen Zahran that they accept the settlement offer. They pointed out that Mr. Zahran made a poor witness and that they believed Judge Curran felt Mr. Zahran did not make a good presentation. They also indicated that the bad faith case was not particularly strong, that the Zahrans would be relieved of the potential judgment based upon the counterclaim, that there was difficulty in proving the damages claimed by the plaintiffs. Robin and Karen Zahran declined the settlement offer.

Mr. Zahran then modified the plaintiffs' contingency fee agreement by signing a note indicating that he and Karen would pay $20,000 minimum to Attorney Kmiec win or lose provided he did not continue to purse settlement or would not bring up settlement again. There were no other conditions placed on the fee agreement. Mr. Kmiec abided by that agreement.

During the course of - - I should say at the conclusion of the trial instructions were submitted to the Court. The elements of misrepresentation in a proof of loss were among those instructions. The jury instructions did not include reference to reliance as an element of misrepresentation. The trial concluded December 23rd, 1991 with a verdict rendered on December 26th. The verdict concluded that the Zahrans had misrepresented their loss under the terms of their policy. Motions after verdict were filed on behalf of the plaintiffs seeking a new trial or judgment notwithstanding the verdict and on behalf of the defendant seeking judgment on the counterclaim.

Throughout the handling of that matter involving Frankenmuth Attorney Kmiec incurred costs and expenses.

Throughout the representation of Mr. and Mrs. Zahran by Attorney Kmiec requests were made to the plaintiffs to reimburse costs and expenses. Mr. Kmiec was eventually allowed to withdraw as counsel of record for the plaintiffs on March 26 of 1992. As of the date of withdrawal to the present date the plaintiffs have failed to make payment to Attorney Kmiec of outstanding costs in the amount of $3,699.92 despite the plaintiffs' agreement to make payment to Attorney Kmiec in the minimum sum of $20,000. No payment has been made.

At or about the time of Mr. Kmiec's withdrawal he outlined the potential hazards of an appeal and gave the Zahrans his advise with respect to settlement. Nevertheless, the Zahrans appealed the trial court's determination pro se. The Seventh Circuit ruled on March 28, 1994 that the jury's decision was valid with regard to the plaintiffs' claim, that is, it was appropriate to dismiss the complaint brought by the Zahrans, wherein it reinstated the counterclaim in that case and directed that judgment be entered against the Zahrans and in favor of Frankenmuth. As a consequence the Zahrans were required to pay $182,888.37. An amended judgment in favor of Frankenmuth on the counterclaim was entered June 29 of 1994.

Between July 23rd, 1990 and October 22nd 1990 Attorney Schmidt made no court appearances in the tornado litigation. He filed no substantive pleadings, made no motions and took no depositions or other discovery. Between July 23rd, 1990 and October 22nd, 1990 there were no deadlines of any sort imposed in the tornado case which expired and there were no substantive pleadings due during that period. On October 12, 1990 Robin and Karen Zahran were represented by Attorney Burrell in an examination under oath by Frankenmuth Insurance.

Attorney Thomas Gooch testified on behalf of the Zahrans with respect to Attorney Schmidt's actions. However, he did not opine that Schmidt failed to adequately investigate

these matters. There is nothing in this record to support any additional response to Frankenmuth or any additional defenses or answers to Frankenmuth's defenses or counterclaims with respect to matters undertaken by Attorney Schmidt.

Let me turn for a moment to Attorney Gooch's testimony and then go back to matters relating more specifically to the defendants. As I said in the beginning, this case does hinge on credibility. Attorney Thomas Gooch gave opinion testimony in this case. His opinion testimony was the linchpin for the plaintiffs' case. However, the Court does not find Attorney Gooch's testimony worthy of belief.

Attorney Gooch testified, one, that Schmidt breached the standard of care owed to Robin and Karen Zahran because there was in irreconcilable conflict of interest. He testified that no attorney could have represented Karen and Robin Zahran. He testified that Frankenmuth paid the Zahrans before they filed a claim and had conducted its own investigation and that should have given rise to certain defenses. He testified that the defendants should have asserted the innocent insured doctrine, that is, they should have asserted that Karen Zahran was not involved in the alleged misdeeds of Robin Zahran.

The Court notes that this is the first time that Attorney Gooch has testified as an expert witness. However, he clearly failed to apply Wisconsin law regarding insurance claims, pleading standards and the duty of care owed by a Wisconsin attorney to his clients. This is especially true with regard to his contention that the defendants had an irreconcilable conflict of interest when they represented Robin Zahran and Karen Zahran. He also failed to acknowledge that Karen Zahran agreed with all of Robin Zahran's actions in that any recovery by Karen Zahran would benefit Robin Zahran.

He also failed to, he also failed to acknowledge that, I should say he also erroneously asserted that it was a breach of duty not to file motions for summary judgment in this case.

And by asserting that it was a breach of the standard of care for attorneys to ignore the reliance issue because Frankenmuth paid plaintiffs before a proof of loss was filed and conducted its own investigation.

With regard to Mr. Burrell, Mr. Gooch testified that Mr. Burrell failed to recognize he couldn't represent both plaintiffs. He told the plaintiff insurance company that Karen Zahran was innocent but never pled it. He asserted that there was no discovery regarding misrepresentation or reliance. He alleged that Mr. Burrell failed to obtain a second attorney for the plaintiffs. He asserted that Karen Zahran had an absolute defense to Frankenmuth's affirmative defense because Schmidt filed a proof of loss after it was signed in blank. And he also asserted that Mr. Burrell failed to plead lack of reliance as an affirmative defense because it paid the plaintiffs before they failed their claim.

Mr. Gooch further asserted that Mr. Kmiec breached the standard of skill required of Wisconsin attorneys again because of a conflict, same conflict previously cited by his failure to file motions regarding other losses, by its failure to amend pleadings, by its failure to preserve the innocent spouse issue for appeal, by his failure to preserve the estoppel issue for appeal, by not submitting jury instructions on the theory of reliance or estoppel, by not seeking dismissal of Frankenmuth's counterclaim and by not filing a motion in limine which should have been directed to the fire loss claim.

I must note further that in determining that Mr. Gooch was not a credible witness the Court also paid special attention to his testimony regarding motions in limine. Mr. Gooch apparently fails to recognize that motions in limine are not necessarily required in any case and he failed to show that there was any, that it was likely that Judge Curran would have ruled in the plaintiffs' favor with respect to the motions in limini. Mr. Gooch was essentially a friend of Attorney Bickley who did not

have the experience in Wisconsin that would have allowed him to testify concerning the standard of care. In fact, Mr. Gooch is not licensed to practice in the State of Wisconsin and indicated that on those occasions when he has represented someone in Wisconsin he has hired local counsel.

So all in all the Court does not believe the plaintiffs presented credible expert testimony with respect to the matters put into issue here and as a consequence were not in a position to sustain their burden of proof by presenting valid, credible expert testimony.

To continue. There are no credible expert facts before this Court to support any additional claims that Robin and Karen Zahran may have had against Frankenmuth in the underlying tornado case. The only proof of loss which Attorney Schmidt submitted to Frankenmuth was on August 28, 1990 in the proof of claim relating to the fire loss. There is no support in the record for the contention of Robin and Karen Zahran that this proof of loss was used in both the tornado case and the fire case to establish fraud on behalf of Mr. or Mrs. Zahran. Robin Zahran has admitted that the damage caused by the fire exceeded the damage claimed in the August 28, 1990 proof of loss. Robin Zahran contends that the proof of loss failed to indicate that he and Mrs. Zahran did not want to be paid twice for the same loss, once for the fire and once for the tornado, and that the proof of loss was used by Frankenmuth to create that inference in support of its counterclaim for fraud.

Frankenmuth's misrepresentation slash fraud counterclaim did not relate to the August 28, 1990 proof of loss but, rather, to the two sworn proofs of loss submitted by Robin and Karen Zahran themselves. The August 28, 1990 proof of loss was mentioned only in Frankenmuth's affirmative defenses for the proposition that Frankenmuth paid its policy limits of $75,000 with regard to barn 151 after the fire and therefore was entitled to an offset of that amount in the tornado case. During

the trial before Judge Curran the $75,000 payment was admitted when Mr. Zahran refused to answer questions regarding what he had been paid for barn 151.

The Court finds that Attorney Schmidt did not negligently fail to raise any affirmative defense related tot he innocent insured defense. Let me add here that plaintiff Karen Zahran has withdrawn her innocent insured claim in this matter but notwithstanding that I do want to note that the proof would have sustained such a claim regardless of whether - - let me just leave it there. The proof would not have sustained that claim.

Attorney Schmidt did not fail to adequately investigate Frankenmuth's allegations, defenses and counterclaims. Attorney Schmidt did not negligently fail to amend pleadings in the tornado action nor fail to pursue claims that Robin and Karen Zahran may have had against Frankenmuth. Attorney Schmidt was not negligent with regard to the August 28, 1990 proof of loss although the Court does note that it was improper to have Robin and Karen Zahran sign the documents in blank. Attorney Schmidt's actions with respect to the August 28, 1990 proof of loss did not, and I underscore that, did not cause Robin and Karen Zahran any damages.

With regard to Attorney Burrell and also with regard to the other defendants, I want to add that Mr. Gooch is assessing the conduct of the defendants in this case said he was applying a standard of care based upon what lawyer admitted to practice in the Seventh Circuit would have done. He did not specifically state that he was applying a standard based upon what attorneys in Wisconsin would have done. On the other hand, he added that he believed Seventh Circuit standards are the same as those in Wisconsin without making any specific reference to the basis for the opinion. The Court notes that there was no expert testimony - - strike that.

The Court finds that Attorney Burrell did not possess any facts suggesting that the proof of loss jointly filed by Robin

and Karen Zahran were misrepresentations filed with an interest to deceive Frankenmuth. Attorney Burrell possessed no facts suggesting that the proof of loss jointly filed by Karen and Robin Zahran were misrepresentations filed with an intent - - strike the last statement. Attorney Burrell did not possess any facts suggesting that Karen Zahran did not participate in the submission of the proofs of loss that were given to Frankenmuth and, in fact, reasonably concluded from Mrs. Zahran's signature on the proofs of loss that she participated in their preparation.

Attorney Burrell possessed no facts suggesting that Karen Zahran believed that any proofs of loss were inaccurate, misleading or fraudulent. Karen Zahran never

innocent insured defense would have insured to the benefit of Robin Zahran. Also, there was no basis for seeking summary judgment on the plaintiffs' claim against Frankenmuth.

With respect to Attorney Kmiec, it's noted that at the time Kmiec assumed responsibility for the representation of the plaintiffs in May of 1991 the trial date was imminent and motions to compel outstanding discovery had been filed. The discovery motions were resolved and the trial date was adjourned. As a result of the representation of Attorney Kmiec plaintiffs were able to retain, prepare and present witnesses at trial on the issue of bad faith, consequential damages in the form of lost milk profits, engineering testimony regarding damages to the structures on the property, et cetera. These witnesses were allowed even though the initial dates for designation of expert witnesses had passed prior to Kmiec's representation.

During the court of Kmiec's representation he and members of his office conducted and participated in numerous depositions of relevant parties and witnesses. Kmiec also conducted a thorough investigation of the facts themselves and visited the plaintiffs' farm in order to ascertain the location of various structures and to provide himself with a mental picture

would assist in his representation at trial. Throughout the course of Attorney Kmiec's representation he and members of his office kept both Mr. and Mrs. Zahran apprised of pre-trial developments and issues.

Throughout the course of Kmiec's representation Mr. and Mrs. Zahran were united in interest. Throughout the course of Kmiec's representation Mrs. Zahran never indicated that her claim was different from that of her husband's. And throughout the course of Kmiec's representation Mrs. Zahran participated in preparation for trial. The Court is of the view that Attorney Kmiec, therefore, exercised, I should say thereby exercised the degree of skill, care and judgment normally exercised by lawyers in Wisconsin. Based upon the court's review of the record below and the matters represented in this trial the Court further finds that plaintiffs have failed to demonstrate that the result of the tornado trial would have been different had the matter been handled as the plaintiffs suggest. Judgment in favor of Frankenmuth was the result of the plaintiffs' own negligence or intentional disregard of their counsel's advise and also because of a lack of proof to support their claims in the case before Judge Curran. There is nothing to indicate that the results would have been different if what the Zahrans now assert had been done in the trail below.

The Court finds that there have been no damages established in this case with regard to the matters that the plaintiffs are now claiming, that is, the plaintiffs have not proven that they have sustained losses as a result of any actions taken by the defendants. On the other hand, as the Court has also already indicated Mr. Kmiec has sustained damages and is entitled to judgment with regard to the contract that he entered with the Zahrans during the course of the trial below as well as his retainer agreement which calls for payment of his costs in connection with his representation.

The Court notes that in this case there are essentially five claims asserted by the plaintiffs. One was for breach of contract, one was for negligence, one was for consumer fraud, one was for common law fraud, one was for violation of fiduciary duty tot the plaintiff and with respect to Robin Zahran only there was a count for conspiracy and fraud by Mr. Kmiec. The claims have in each instance failed to meet their requisite burden of proof and their complaint against the defendants will, therefore, be dismissed.

Unless there are questions at this time the Court will on the basis of what has been set forth on the record enter judgment in favor of the defendants and against the plaintiffs in this case. As far as this case has gone, I do note that there was an additional claim by Mr. Kmiec which we did not pursue during this course of trial, during this trial. So I'd like to find out from Mr. Kmiec's counsel how he wishes to proceed in that regard.

MS. NELSON: Your Honor, I think that there are potentially two options at this point. The claim for malicious prosecution was not ripe until the Court's findings of today and the entry of judgment in favor of the defendants. I believe that claim is now ripe. the two alternatives that I see would be a determination by this Court that the judgment entered today would be final under Rule 54(b) for the purposes of appeal should anyone choose to take it ,or the other alternative is to enter into scheduling with regard to the further prosecution of the malicious prosecution claim.

During the course of trial the court had directed a question to me concerning additional proof. I'm not sure that I ever directly answered the question. In giving this matter some thought it occurs to me that the bulk of the evidence in support of the malicious prosecution claim has, in fact, been entered. I would anticipate that additional testimony, nor more than a day as for as Mr. Kmiec is concerned.

THE COURT: Well, the Court will enter judgment on the matters which have already been tried and the clocks will start to tick with respect to them. As far as the malicious persecution claim is concerned, the Court will give you a date and time to present. So I'll get my clerk for that purpose. Are there any other comments by counsel for the defence?

MR. JOHNSON: Your Honor, just one question. I presume that since that issue doesn't involve my client that we need not plan on participating in that.

THE COURT: I would hope not.

MR. JOHSNON: Thank you.

THE COURT: Mr. Nowakowski

MR. NOWAKOWSKI: I have nothing other than to echo what Mr. Johnson just said.

THE COURT: Mr. Bickley.

MR. BICKLEY: No comment, Your Honor.

THE COURT: All right. Give me - -

MR. BICKLEY: Your Honor - -

THE COURT: Thursday, July 30th, 9:00 o'clock. I'm sorry. October 30th, 9:00 o'clock.

MR. BICKELY: May I make one comment?

THE COURT: Yes.

MR. BICKLEY: Judge, with respect to the abilities or the need to have expert testimony dealing with the contentions of the plaintiff in this case, I would like to request did the Court give any consideration to the massive cases in the State of Wisconsin that said that when some things are so basic during the course of a trial that you don't need a legal expert to come in and testify for it, that a court can make a finding of fact based on the fact that whatever - -

THE COURT: Perhaps my findings were not clear. I indicated that the plaintiffs did not present expert testimony, credible expert testimony or other proof.

MR. BICKLEY: I see.

THE COURT: I don't believe there was any testimony during the course of this trail to the effect that there was anything neglected by any of these attorneys which was so obvious that it would constitute malpractice not to pursue it as the plaintiffs assert. The plaintiffs essentially argued, I should say essentially Mr. Zahran in this testimony essentially underscored what he believed Mr. Gooch had testified to. I don't believe that there was any testimony to the effect that any of these defendants did anything wrong. In fact, attorneys have a right to utilize certain, to follow certain tactics or to follow certain guidelines based upon their view of the evidence in the case.

There was nothing in this record to show that a summary judgment motion had to be filed in this case. There was nothing in this record to show, for example, that a motion in limini was compelled or that it would have been malpractice not to file a motion in limine. In fact, I think it's quite frankly an incredible stretch to assert that an attorney needed to file a motion in limine prior to the trail before Judge Curran or during the course of the trail before Judge Curran.

MR. BICKLEY: Even where one of the issues raised in the course of the trial, Your Honor, was the possible arson of the defendant, 49 times.

THE COURT: Even though that someone may have mentioned a fire in the case that did not require a motion in limine. A motion in limine could have been made or request for cautionary instructions could have been made but it certainly was not required. An attorney has a right to assess the situation as he or she sees it at the time. And as for the matter of trail tactics, an attorney could reasonably conclude that it would have been more injurious to underscore a point raided by the opposition than to proceed as you suggest.

MR. BICKELY: Thank you, sir.

THE COURT: 9:00 o'clock, October 30th. The Court does want to again emphasise that the foregoing constitutes its findings of fact and conclusions of law and it will enter partial judgment, judgment against the plaintiffs on their claim and in favor of the defendants. With respect to the remaining matter, the Court will proceed as indicated on October 30th at 9:00 o'clock. All right. I do just want to apprise Mr. Bickley of something else involving the unrelated case.

(Proceedings than held involving another case.)

THE COURT: I want to also say for the record back in case number 95-C-334, there were motion for summary judgment filed by virtue of this Court's decision with respect to the case. Those summary judgment motions are dismissed as moot. And I believe those are documents 169, 243 and 215. Thank you very much.

(Afternoon proceedings concluded at 3:02 p.m.)

* * *

Cynthia M. Bohman, Official Court Reporter for the United States District Court, Eastern District of Wisconsin, Milwaukee, Wisconsin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
OFFICE OF THE CLERK

SOFRON BL NEDIKSLY
CLERK

362 U.S. COURTHOUSE
517 E. Wisconsin Ave.
Milwaukee, WI 53202

RECORD TRANSMITTAL LETTER
March 30, 1999

Mr. Gino J. Agnello, Clerk
United States Court of Appeals
Seventh Circuit
219 S. Dearborn St.
Chicago, IL 60604

RE: **Zahran v. Schmidt, et al.**
USCA No.: 98-2123. 97-3710
USDC No.: 95-C-334

Dear Mr. Agnello:

Enclosed herewith please find the record on appeal in connection with the above-referenced case consisting of:

[6] Volumes of pleadings
[16] Loose pleadings
[20] Volumes of transcripts
[3] Exhibits - 3 boxes
[ ] Volumes in camera materials
[ ] Other

Please acknowledge date of receipt of the above referenced materials on the enclosed copy of this letter.

Very truly yours,

SOFRON B. NEDILSKY

Clerk, U.S. District Court

By

Holly Vila
Deputy Clerk, Appeals

Enclosure
cc: Robin Zahran, Christine Nelson
Charles Bohl, Terry Johnson

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

NOTICE OF ISSUANCE OF MANDATE

Date: May 6, 199

To: Sofron B. Nedilsky
United States District Court
Eastern District of Wisconsin
Room 362
517 E. Wisconsin Ave.
U.S. Courthouse & Federal Building
Milwaukee, WI 53202

From: Gino J. Agnello, Clerk

Re: 99-1780
Zahran, Robin v. Schmidt, Gerald G.
95 C 334, Charles N. Clevert, Judge

Herewith is the mandate of this court in this appeal, along with the Bill of costs, is any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to the costs shall constitute the mandate.

[X] No record file

[ ] Original record on appeal consisting of:

Enclosed:		To Be Returned At Later Date:
[ ]	Volumes of pleadings	[ ]
[ ]	Loose pleadings	[ ]
[ ]	Volumes of transcripts	[ ]
[ ]	Volumes of exhibits	[ ]

[ ] Volumes of depositions [ ]
[ ] In Camera material [ ]
[ ] Other [ ]
Record being retained for us [ ]
in Appeal No.

Copies of this notice sent to: Counsel of record
[ ] United States Marshal
[ ] United States Probation Office

Note To Counsel:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WICSONSIN

ROBIN ZAHRAN and
KAREN ZAHRAN,
Plaintiffs, Case No. 95-C-0334
v.
GERALD G. SCHMIDT, JR. ET AL.
Defendant.

DEPOSITION OF ROBERT C. BURRELL was taken at the instance of the Plaintiffs, under and pursuant to the provisions of Section 804.05 of the Wisconsin Statutes.

show you, would that refresh your memory?
A. You showed me a check for $20,000.
Q. And is it cashed?
A. Yes. Deposited.
Q. Did you receive any more money other than this $20,000?
A. I don't recall.
Q. And that $20,000 payment resulted from you collecting the 182,000 by Frankenmuth for both Robin Zahran and Karen Zahran?
A. Yes.
Q. Now, do you remember ever communicating with Frankenmuth attorneys that Karen Zahran is an innocent insured?
A. I think I took that position with them at one point.
Q. You did. Did you amend the complaint to reflect that?
A. No.

Q. Any reason?
A. Didn't need to.
MR. JOHNSON; Object. Vague.
BY MR. ZAHRAN:
Q. Now, you believed that Karen Zahran was an innocent insured; is that correct?
A. Innocent of what?
A. Of what facts?
Q. To prove any of the allegations that Frankenmuth is alleging or to defeat it?
A. I went into all of the positions that I felt Frankenmuth was taking at the time of their deposition.
Q. You did. And what did you find out through your own findings?
A. That question's too broad to answer.
Q. Did you find out that there was misrepresentation by Robin Zahran that supports the facts that are being alleged by Frankenmuth?
A. I took the position there was not a misrepresentation and it didn't occur and, on that basis, we got a payment for you.
Q. The 182,000?
A. Correct.
Q. Now, did you ever invoke the estoppel?
A. Yes.
Q. Principles?
A. Yes.
Q. In your pleadings?
A. Yes.
Q. Is that a defense?
A. Yes.
MR. ZAHRAN: We haven't been talking about that. That's something - - I'm driving to these

certain facts. I only ask questions after I present certain - -

MR. JOHNSON: I'm not going to start arguing with you. I make my objections, the witness answers, you go on and on. go ahead.

BY MR. ZAHRAN

Q. Go ahead.

A. The entire investigation and handling of the file and the documents that were filed on your behalf, including collecting on your behalf from Frankenmuth.

Q. You mean the $182,000?

A. You bet.

Q. Now, so you're saying that everything that you did in behalf of Karen and I was the proper thing to do at any given time?

A. Absolutely.

Q. No doubt about it?

A. Yes.

Q. Including the lawsuit, the $182,000, the representation with the fires, the way it is, allowing Frankenmuth to file for amendment of their complaint and failure to move for specific defenses

FRANKENMUTH POLICY PROVISION
REFERENCING MISREPRESENTAITON

CONDITIONS APPLICAPLE TO ALL COVERAGES

6. **Misrepresentation, Concealment or Fraud**

This entire policy is void if, whether before or after a loss:

a. An insured was willfully concealed or misrepresented:

(1) any material fact or circumstance concerning this insurance; or

(2) an insured's interest herein.

b. There has been fraud or false swearing by an insured regarding any matter relating to this insurance or the subject thereof.

CONDITIONS APPLICABLE TO ALL COVERAGES

Under Condition 4. . Change, Modification, or Waiver of Policy Terms, the following is added:

Knowledge by our authorized agent or material facts pertaining to this insurance is considered knowledge by us.

A failure by the insured to perform an act required under the policy will not affect our duties under this policy if the failure was caused by an act, statement, representation or omission by our authorized agent.

Under Condition 6. . Misrepresentation, Concealment or Fraud the following is added:

No misrepresentation or breach of affirmative warranty affects our obligations under the policy uniess.

1. We rely on it and it is material or it is made with intent to deceive or

2. The fact misrepresented or falsely warranted contributes to the loss.

No failure or a condition prior to the loss and no breach or promissory warranty affects our obligations under the policy unless it exists at the time of the loss and :

1. Increases the risk at the time of the loss: or
2. contributes to the loss.

This does not apply to non-payment or premium.

No failure or a condition prior to the loss and no breach or promissory warranty affects our obligations under the policy unless it exists at the time of the loss and :

1. Increases the risk at the time of the loss: or
2. contributes to the loss.

This does not apply to non-payment or premium.

NOV-4-1998 13:18 SHANNON & ASSOCIATES
312 332 0600 P.02/02

No. _____

IN THE
SUPREME COURT OF THE UNTIED STATES
OCTOBER TERM, 1998

ROBIN ZAHRAN and KAREN ZHARAN,
Plaintiffs-Petitioners,

v.

FRANKENMUTH MUTUAL INSURANCE COMPANY, THOMAS H. KOCOUREK, Sheriff of Manitowoc County, Wisconsin and his agents and representatives and the Corporation of Manitowoc County, Wisconsin, ROBERT ZEITNER, STEVEN L. POPUCH, and the LAW FIRM OF SWIFT, POPUCH & SINCLEAR,
Defendants-respondents.

ON PETITION FOR A STAY OF MATTERS PENDING IN THE UNITED STTES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION TO JUSTICE JOHN PAUL STEVENS CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT TO STAY MATERS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Attorney for Plaintiffs-Petitioners

CERTIFICATE OF FILING

I, Andrew M. Cohen, an attorney certify that I filed the within PETITION TO JUSTICE JOHN PAUL STEVENS CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT TO STAY MATTERS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, by sending the same to the Clerk of the United States Supreme Court, Supreme Court Building, Washington, DC 20534, via Federal Express on October 30, 1998 before 5:00 p.m.

CERTIFICATE OF SERVICE

I, Andrew M. Cohen, an attorney certify that I filed the within PETITION TO JUSTICE JOHN PAUL STEVENS CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT TO STAY MATTERS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, by personally delivering a copy to the United States Court of Appeals for the Seventh Circuit, and by placing a copy in the United States Mail before 5:00 p.m. on October 30, 1998, with proper first-class postage prepaid, addressed to the following counsel of record and/or parties:

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